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The senate at Washington has recently passed a wise measure in the form of a bill to withdraw from the United States Supreme Court all jurisdiction in criminal cases, except those involving capital punishment, and to transfer this jurisdiction to the United States Courts of Appeals. This will be a great relief to the Supreme Court whose docket has always been encumbered with embezzlement cases and other criminal matters which have greatly impeded more important litigation. The Circuit Courts of Appeal are well able to attend to such cases and are quite as likely to do them justice as the supreme court is. It is, however, proper that cases involving the death penalty should have the right of appeal to the highest tribunal in the land.

A case recently decided by the court of Oyer and Terminer of Delaware (State v. Lodge, 33 Atl. Rep. 312), has been the subject of considerable controversy and criticism, some upholding the doctrine announced, others disputing it. The court, in that case, held that dying declarations may be contradicted by proof of previous inconsistent statements by the deceased. The technical argument in favor of such position is thus stated by the court: Dying declarations are admitted in homicide cases because the parties are apprehensive of impending death, and there is the prospect of almost immediate dissolution on the ground that, as they are about to enter the presence of their maker, it is supposed that they will not dare to deceive any more than when they invoke the attention of their Creator to the oath when made, so that the fact of their coming dissolution is considered to be quite as binding as the taking of an oath in its obligation upon them. The objection made always is that the accused is deprived of the opportunity of calling the attention of the person who supposed himself to be about to die to certain facts, which, if brought to his attention, he might modify his statement or make none at all; that there is no opportunity to test his judgment, the strength of his recollection, or his bias. But the law says that insures justice in the greater number of cases, and that it is necessary to let it in, although it does deprive the defendant of testing the memory of the witness and his truthfulness by cross-examination. Then it is as though it says: "Very well, if you are deprived of that opportunity of ascertaining if that witness was wrong, and of bringing any witness to contradict him, when we let in the dying declarations, without an oath, you ought to have the right to put in testimony of previous declarations, without laying the ground." In other words, the party on one hand says: "If you let in the dying declarations, I ought to have the right to contradict them (aside from the rule that I am bound to lay the ground for a contradiction) by proof of a previous conversation." And so the two, according to Judge Field and these other authorities, seem to balance each other; and, where there is a balance, the law leans in favor of human life or personal liberty. That is just the situation. Now the question is, where there is a loss of cross-examination on the side of the defense and also by the State, in that you have not laid the ground, whether the favor of the law should not be on the side of liberty and life, and should let in the previous statements that are contradictory of the statements made by the person who supposed she was dying. Therefore, as dying declarations are admitted on the ground of necessity, ought not, asks the court, proof of contradictory or inconsistent statements by the deceased to be also admitted on the same ground? Bearing in mind the reason of the rule which admits in evidence declarations of this character, the view of the Delaware court seems warranted and in the interest of justice. In the *Harvard Law Review* for February, however, will be found a vigorous criticism of the ruling.

NOTES OF RECENT DECISIONS.

LANDLORD AND TENANT—LEASED BUILDING—DAMAGE BY FIRE—INSURANCE.—It is held by the Supreme Court of Tennessee in Anderson v. Miller, 33 S. W. Rep. 615, that an owner of a building, though he has, under a fire policy, recovered the full loss sustained by the burning of his building, caused by his lessees, in violation of their lease, storing

cotton therein, may, in his own name, sue his lessees for the damages to the building. The court said that even if it be conceded that the insurance company, having paid the entire fire loss, is now entitled to be subrogated to the rights of the insured, as against the tort feasor, or to recover back from him the amount he recovers, still it does not prevent a recovery in the name of the insured for the damage sustained. The question of who will be entitled to the proceeds of the recovery —the insurer or the insured—is a matter between them, and constitutes no defense to an action for the damages caused by the wrong, which, in any event, must be brought in the name of the owner and insured, although it might be for the use of the insurer. 24 Am. & Eng. Enc. Law, pp. 308-30; Perrott v. Shearer, 17 Mich. 48, 55, 56; Clark v. Wilson, 103 Mass. 219-227; Hayward v. Cain, 105 Mass. 213; Weber v. Railroad Co., 35 N. J. Law, 409; Mason v. Sainsbury, 3 Doug. 61; Yates v. Whyte, 4 Bing. (N. C.) 272; Hart v. Railroad Corp., 13 Metc. (Mass.) 99; Insurance Co. v. Woodbury, 45 Me. 453; Carpenter v. Insurance Co., 16 Pet. 501; Insurance Co. v. Updegraff, 21 Pa. St. 518; Kernochan v. Insurance Co., 17 N. Y. 428; Honore v. Insurance Co., 51 Ill. 410; Insurance Co. v. Boomer, 52 Ill. 442.

ACCORD AND SATISFACTION — RECEIPT IN FULL—LIQUIDATED AND UNLIQUIDATED CLAIM. —In Tanner v. Merrill, 65 N. W. Rep. 664, it was held by the Supreme Court of Michigan that where defendants deducted from plaintiff's wages an amount paid by them for railroad fare for plaintiff, for which latter sum plaintiff claimed that defendants and not he were liable, the defendants disputing such liability for fare and plaintiff accepting the amount tendered and giving a receipt in full, that he was precluded from maintaining an action for the sum so deducted. The rule is well settled that where a certain sum is tendered and accepted in satisfaction of a claim, the amount of which is unliquidated, the transaction will be held an accord and satisfaction, although no formal release be given. A comparatively recent illustration is Fuller v. Kemp, in the New York Court of Appeals, 138 N. Y. 231. In an earlier Michigan case—Leeson v. Anderson, 58 N. W. Rep. 72,—it was held that a claim by the holder of a promissory note past due was not an unliquidated claim, and that acceptance of a less sum than the face of the note, with an agreement to discharge the debt, did not operate to fully release the debtor. The point involved in Tanner v. Merrill was whether the claim of plaintiff on account of wages and railroad fare constituted a single claim, and whether, if so, it was a liquidated or unliquidated claim. The question was somewhat close and two of the judges of the court dissented.

SLANDER—DISHONOR OF CHECK—BANKS.— The case of Suenden v. State Bank, 65 N. W. Rep. 1086, decided by the Supreme Court of Minnesota, presents an unusual question in the law of slander. It is held that when a banker has in his hands funds of a depositor for the purpose of paying the depositor's checks and the depositor is a trader or merchant, and his check is dishonored by the banker, and returned to the payee, for the alleged reason that he has not sufficient funds of the maker in his hands to pay the same, when he in fact has, it amounts to a slander of the merchant or trader in his business, and he is entitled to recover general compensatory damages in an action against the banker. The court says:

> It is held by the authorities that in such a case the plaintiff's recovery is not limited to nominal damages, but he is entitled to recover general compensatory damages. Rolin v. Steward, 14 C. B. 595; Schaffner v. Ehrman (Ill. Sup.), 28 N. E. Rep. 917; Bank v. Goos (Neb.), 58 N. W. Rep. 84; Patterson v. Bank, 130 Pa. St. 419, 18 Atl. Rep. 632; 3 Am. & Eng. Enc. Law, 225; 1 Suth. Dam. (2d Ed.) § 77. The case of Patterson v. Bank, *supra*, seems to place the right to recover more than nominal damages in such a case on the ground of public policy, but the other cases place it rather on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slandering the trader in his business. We are of the opinion that the recovery of more than nominal damages can, on sound principle, be sustained on the latter ground, where the drawer of the check is a merchant or trader. To refuse to honor his check is a most effectual way of slandering him in his trade, and it is well settled that to impute insolvency to a merchant is actionable *per se*, and general damages may be recovered for such a slander. Townsh. Sland. & L. (4th Ed.) § 191; Odger, Sland. & L. (2d Ed.) 80. Respondent's position that an action of tort cannot be maintainad in such a case as this, and that plaintiff's only remedy is an action on contract, in which only nominal damages can be recovered, is not sustained by the authorities. The case of Marzetti v. Williams, 1 Barn. & Adol. 415, cited by him, was an action in tort. The amount of the verdict is not reported, but it is very evident that

it was only for a nominal amount, and the only question before the court was whether or not the defendant was entitled to a nonsuit because the action should have been brought on contract, not in tort. The court held against the defendant on that point, and what is said beyond this is merely *obiter*, and was so regarded in the subsequent case of Rolin v. Steward. In Prehn v. Bank, L. R. 5 Exch. 92, the only question was whether plaintiffs were entitled to recover of the bank certain sums which they had paid to save their credit by procuring money elsewhere to pay bills drawn by them on the bank, and to prevent the bills from going to protest after the bank had notified them that it would not pay these bills, although it had funds in its hands for that purpose. It was held that they could recover the full sum so paid by them to preserve their credit, and the authority of Rolin v. Steward was expressly recognized. The case of Brooke v. Bank, 69 Hun, 202, 23 N. Y. Supp. 802, was an action by the receiver of an insolvent whose check had been wrongfully dishonored by the bank. The plaintiff was forced to concede that he could not maintain an action of tort, or recover any damages but such special damages as he alleged and could prove in an action for breach of a contract. These are all the cases cited which have any bearing on the case. These are the only questions raised worthy of consideration. It necessarily follows from the foregoing conclusions that the order appealed from must be reversed.

EXECUTORS AND ADMINISTRATORS — PERSONAL LIABILITY ON CONTRACT.—The Supreme Court of Montana says, in First Nat. Bank v. Collins, 43 Pac. Rep. 499, that an administrator is personally liable on a note signed by him as such, the proceeds of which were placed with the payee, a bank, and paid out on checks drawn by him to pay, generally, bills and debts of the estate. The court says:

The defendants, in their answer, make their allegations with some vigor of language, but when we arrive simply at the facts set up, the pleading of defendants seem to be that they, as administrators of the Higgins estate, borrowed this money and used it for the estate. We cite the following remarks from some of the leading text writers upon the law of administration, negotiable instruments and commercial paper: "It is a well recognized principle that for liabilities contracted by the personal representative, although for the benefit and in the interest and behalf of the estate, it is not liable to creditors. Disbursements, reasonable in amount and for services necessary in the proper discharge of the duties imposed upon them, will constitute a charge in favor of executors and administrators against the estate, although their allowance should leave no surplus to pay creditors of the deceased; but in the absence of statutory authority the probate court, as already stated, has no jurisdiction to adjudicate between the personal representative and the creditor. It follows that the estate is not liable to an attorney for his services at the instance of an executor or administrator, but that the latter is himself liable in a suit by the attorney. So for corn fed to the stock of the estate; for the terms of a contract by the administrator in renting the land of the estate. The same holds good in respect of negotiable paper made, indorsed or accepted by him, although he add to his signature his official character; and *a fortiori* where he gives a bond. So where the executor employs a salesman to take charge of the stock in trade belonging to the estate, or a sawyer to saw lumber. So where money is borrowed by pledging property of the estate, unless pledged for the purposes of administration. For the same reason, the estate is not bound by the administrator's agreement to credit a note payable to his decedent with the value of work done upon the lands of the estate." 2 Woerner Admn., § 356. "The executor or administrator of a decedent has no power to bind the latter's estate by any note or bill which he may make in his representative capacity. So also is it impossible for the executor or administrator to bind the estate by the acceptance of a bill drawn in settlement of a claim against the estate. In all such cases, the executor or administrator is personally liable, even though the signature is stated in the most explicit manner to have been made in his representative character." Tied. Com. Paper, § 146. "An administrator or executor cannot bind the decedent's estate by any negotiable instrument. He can only bind himself. If he make, accept or indorse a negotiable instrument he will bind himself personally, even if he adds to his own name the designation of his office as personal representative. Thus, if he signs himself, 'A B, executor (or administrator) of C D,' or 'A B, as executor of C D,' the representative terms will be rejected as surplusage. And an accommodation indorser, or acceptor, who pays the amount of the instrument, has no claim against the decedent's estate. But if the bill or note of the personal representative be taken for a debt of the decedent, the estate is discharged from liability, and the representative alone is bound." 1 Daniel, Neg. Inst. § 262. "Where a note or bill is given by an executor or administrator, as such, he will, in general, be individually liable for its payment. So upon an indorsement by him as executor; or upon his written promise to pay such debt, he having assets of the estate in his hands at the time of giving the promise. This is true, also, where he has given his note in renewal of one made by his testator. In like manner, an administrator will be individually liable on a note given by him for personal property purchased for the benefit of the estate. But a note given by an administrator, and expressed to be 'for value received by A (the intestate) and his heirs,' has been held to be void for want of consideration. The mere addition of 'administrator' to an acceptor's signature does not qualify his liability or render the acceptance of a bill conditional. But, in general, an executor, like an agent, must expressly limit his promise to payment out of the estate represented in order to avoid individual liability on it. And merely adding the word 'administrator' will not amount to such a restriction, as we have seen; especially where the estate administered is not particularly designated." 1 Rand. Com. Paper, § 439. See also numerous cases cited in these textbooks, which we will not review.

It is not pretended that these notes were given for the expenses of administration. This court said, in Dodson v. Nevitt, 5 Mont. 518, 6 Pac. Rep. 358: "Claims against the estate are those in existence at the date of the death of the deceased. Other claims against an estate are those incurred by the administrator or executor in settling the estate, and are properly denominated 'expenses of administration.'" The rule seems to be as laid down by the above-quoted writers. It is said, in Dunne v. Deery, 40 Iowa, 251, a case relied upon by the appellants, as follows: "The

rule is very well settled that an administrator or executor cannot bind the assets of the deceased by his promissory note. If he executes a note and adds to his signature, 'as executor for' the deceased, he will nevertheless be personally liable. King v. Thom, 1 Term R. 489; Aspinall v. Wake, 10 Bing. 55; Davis v. French, 20 Me. 21; Walker v. Patterson, 36 Me. 273. But while the administrator will be personally and alone bound upon the note, yet if that for which it was given was legally a claim against the estate, the giving and accepting the note will not, without more, discharge the estate." Counsel, in argument, cite this Iowa case as showing that the case at bar is an exception to the general rule, but it does not appear in the case before us that that for which the note was given was already legally a claim against the estate. We take the following from another case relied upon by the appellants—McLaughlin v. Winner (Wis.), 23 N. W. Rep. 402: "It is a general rule that, upon all contracts made by an executor or administrator, in the discharge of his duties as such, he is liable personally; and his liability does not depend upon the fact that he has assets in his hands sufficient to discharge the debts so incurred; and the judgment, if any be recovered, is to be satisfied out of his estate, and not out of the estate of the deceased. There are, undoubtedly, exceptions to the general rule, but they depend upon equitable considerations, which clearly show that the estate in the hands of the executor or administrator ought to be charged with the payment of the claim, rather than the property of the executor or administrator"—citing many cases. The case at bar, in our opinion, is not an exception to the rule that the administrators are personally liable. It does not appear that the notes given by them were simply an acknowledgment of a former debt existing against the estate and created by the deceased. It does not appear that the money received by the estate upon the notes given was used for purposes of administration or funeral expenses, if such facts would be important if they existed. It does not appear that the money so obtained was upon any order or permission of a court having power to make such order or give such permission. It does not appear that the money was used in the actual preservation of the estate, as discussed in Dunne v. Deery, *supra*.

TORTS — RIGHT OF ACTION—CONSENT.—The principle involved in Goldnamer v. O'Brien, 33 S. W. Rep. 831, decided by the Court of Appeals of Kentucky, is an old and well recognized one but its application to the facts of that case was somewhat novel and interesting. The holding was that in an action for inducing plaintiff to submit to an attempted abortion, where defendant was not responsible for the pregnancy if plaintiff voluntarily went to a certain city to have the abortion performed, she could not recover. The court says:

While it is not directly shown that either of them employed or otherwise procured the physician, and such conclusion is based on the barest inference, yet this question was properly submitted to the jury, and we shall assume such a state of facts. Waiving other questions, the important one on this appeal is, can the plaintiff maintain this action? Or, rather, as the petition avers an abduction and attempted abortion, against the plaintiff's will and consent, the question is, is she entitled to a judgment upon the state of fact thus assumed to exist, and apparently found to exist by the jury? The right to recover is, of course, clear, unless it is destroyed by the complainant's consent to the assault, and whether this affects the right is a question of much conflicting authority. It may be stated, generally, that the suit of a wrongdoer will be rejected when seeking redress for another's having participated with him in the wrong. Thus, a woman who immorally yields to her seducer cannot sue, because she consented to and participated in the wrong whereof she complains. Bish. Non-cont. Law, § 57; Cline v. Templeton, 78 Ky. 550. The author last quoted further says (section 196), that "rape, one of the most aggravated batteries, is, if the woman consents, neither rape, nor even assault," and that "the execution of any unlawful contract places it past annulment and leaves no right of action in either party against the other. So that, though a mutual beating by consenting parties is a wrong against the public, because a breach of the peace, it is not such as between themselves, since neither can complain of that to which he consented." And the learned author, after citing a number of American and English cases to sustain the text, adds: "Such is the distinct and inevitable deduction of the reasoning of the law—applicable, however, in all its consequences, only when the beating was not in the excess of the consent. But we have American cases in which the judges have overlooked the distinction between the civil and criminal remedy, and so have held that one may maintain his civil suit for a battery to which he consented, and in which he participated. Decisions like these, proceeding on a misapprehension, and overlooking established law not brought to the notice of the judge, should not be followed in future cases." To the same effect, Mr. Roscoe says (Rosc. Cr. Ev. 306): "In consequence of the natural desire not to permit a flagrant act of immorality to go unpunished, an attempt has frequently been made to treat that as an assault which is consented to on the part of the person who is the subject of the act. But on examination it will be found that there is no authority for such a position." The author cites numerous authorities supporting the text, but points out that not every act of submission implies consent. Thus, from the mere submission of a child or person of weak mind, consent is not necessarily to be presumed. In the case at bar, however, it would be too much to say that the act of the complainant was not willingly and intentionally done. In Wait, Act. & Def. p. 344, § 11, it is said: "An assault implies force upon one side, and repulsion, or at least want of assault on the other. An assault upon a consenting party would therefore be a legal absurdity." On the other hand, Mr. Cooley, in his work on Torts (page 163), says that "consent is generally a full and perfect shield, when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. · · · But in case of a breach of the peace it is different. The State is wronged by this, and forbids it on public grounds. If men fight, the State will punish them. If one is injured, the law will not listen to an excuse based on a breach of law." The rule of law is therefore clear and unquestionable that consent to an assault is no justification; and one wounded in a duel is said by the learned author to have a cause of action for damages against his adversary, for a consent which the law forbids

cannot be accepted as a legal protection. Some of the cases cited by the author, however, are criminal prosecutions, but others support the text. These authorities seem to be irreconcilable. While we readily appreciate the argument that, so far as the State is concerned, no consent can be pleaded in justification, we have not been able to understand how, in a civil suit, in which the party consenting alone is interested, compensation can be allowed by the law. If both parties to the action are violators of the law, must the mouth of one be closed, and the complaint of the other heard? The parties stand on an exact equality before the law, and, if one wrongfully consented to beat another, the other as wrongfully consented to be beaten. In a late work on this subject it is said: "Harm suffered by consent is not, in general, the basis of a civil action. If the defendant is guilty of no wrong against the plaintiff, except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of the wrongful act should be permitted to profit by it." 1 Jagg. Torts, p. 199. In Duncan v. Com. (1838), 6 Dana, 295, the defendant in an indictment for an affray pleaded a former conviction under an indictment for an assault and battery, and this court said: "As an affray is a disturbance of the public peace by a fighting with the mutual consent of the combatants, it would be intrinsically improbable that a conviction for an assault and battery—which would not be authorized unless there had been a trespass without the consent of the person injured had been adjudged as a punishment for an act which should be deemed an affray." And while in that case, and the quotation from Roscoe as well, the law in criminal cases was being considered, and the rule as laid down is not now followed, the authority strongly tends to support the principle that at least the party consenting to the injury cannot profit by his wrongful act. The instruction, therefore, asked by the appellants, that if the plaintiff voluntarily went to Louisville for the purpose of having the alleged abortion performed on her, the law was for the defendants—should have been given. Judgment reversed for proceedings consistent with this opinion.

SALE OF DEFECTIVE ARTICLES — LIABILITY TO PERSONS INJURED.—The Supreme Court of California decides, in Lewis v. Terry, 43 Pac. Rep. 398, that one who knowing an article to be defectively constructed represents it to be safe and sells it to a person who has no knowledge of the defect, is liable in damages to one who without fault on his part, was injured while lawfully using the same. The court says:

The complaint is faulty in not stating directly that the fall of the bed was caused by the latent defect described, but, as the argument of the parties has proceeded on the theory that such was the fact, we may join in that assumption. Schubert v. J. R. Clark Co., 49 Minn. 335, 51 N. W. Rep. 1103. We agree that the action cannot be sustained on the ground of any privity of contract between plaintiff and defendants, for there was none. If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made. Coughtry v. Woolen Co., 56 N. Y. 127; Heizer v. Manufacturing Co., 110 Mo. 605, 19 S. W. Rep. 630; Winterbottom v. Wright, 10 Mees. & W. 109 (the leading case); Shear & R. Neg. § 116; 1 Bevan, Neg. p. 60, *et seq.* But when the seller, as in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous, because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts. "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other who is not himself in fault." Wellington v. Oil Co., 104 Mass. 64, per Gray, J.; Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N. W. Rep. 1103; Elkins v. McKean, 79 Pa. St. 493; Shear. & R. Neg. § 117. See Civ. Code, §§ 43, 1708. The liability of the willful wrongdoer in like instances is recognized in several cases cited in support of the judgment. Longmeid v. Holliday, 6 Exch. 765; Heizer v. Manufacturing Co., 110 Mo. 605, 19 S. W. Rep. 630.

The fact insisted upon by respondents that a bed is not ordinarily a dangerous instrumentality is of no moment in this case. If mere non-feasance or perhaps misfeasance were the extent of the wrong charged against defendants, that consideration would be important (Thomas v. Winchester, 6 N. Y. 397); but the fact that such articles are in general not dangerous would seem to enhance the wrong of representing one to be safe for use when known to be really unsafe, for the danger is thus rendered more insidious.

Nor is the further point that the chain of causation implicating defendants in the injury was broken by the intervention of the Appersons, as the persons who furnished the bed immediately to plaintiff, available to defendants on this appeal. To have that effect, it must appear that the Appersons knew of the defect in the structure of the bed, and so, were culpable intervening cause, and this does not appear on the face of the complaint. Pastene v. Adams, 49 Cal. 87; 1 Bevan, Neg. 76. The judgment should be reversed, with instructions to the court below to overrule the demurrer.

WHEN SHOULD THE VERDICT BE SET ASIDE WHERE THE COURT HAS INSTRUCTED THE JURY TO DISREGARD IMPROPER EVIDENCE ADMITTED OVER OBJECTION AND EXCEPTION.

On the trial of actions it frequently happens that improper evidence is admitted over objection and exception taken to the ruling of the court. Afterwards, the court becoming aware of its error, attempts to cure it by instructions to the jury to disregard the improper evidence, or, by withdrawing the evidence in question from the consideration of the jury, when convinced of the error, and afterwards instructing to disregard the im-

properly admitted testimony. Whether the error is cured and the exception vitiated by this procedure on the part of the court, is a question arising often on appeal. The question has not been decided with uniformity, for courts entitled to the highest respect have held such error not cured while other tribunals of equal merit have pronounced the error cured.

In Criminal Cases. — Some jurisdictions distinguish between civil and criminal cases in regard to this subject. In Missouri[1] and England[2] the distinction is clearly recognized. In Missouri, the rule is that the erroneous admission of evidence, in a criminal trial, is not cured by the withdrawal of the objectionable evidence or the direction of the court that it be disregarded.[3] The reason for the rule as stated by the court is, "The extreme solicitude of the law that persons accused of crime shall have a fair trial" for "the improper evidence has already poisoned the mind of the jury and cannot be erased from their memories." In State v. Mix, on an indictment for passing counterfeit notes, the statements of defendant that he had been sentenced to the Kentucky penitentiary, were allowed to be proved by a witness who had heard them. Under the circumstances this was improperly received. "The court, afterwards, did all it could to cure the impropriety, by withdrawing it from the jury, but it was wrong to allow it at first; the injury it caused to defendant, may have been too deeply fixed on the juror's minds to be easily obliterated." The English law, as stated by Stephen, is: "If, in a criminal case, evidence is improperly admitted or rejected, there is no remedy, unless the prisoner is convicted, and unless the judge, in his discretion, states a case for the court of crown cases reserved; but if that court is of the opinion that any evidence was improperly admitted or rejected, it must set aside the conviction." There are criminal cases in other States beside Missouri, where such error has not been deemed cured by the action of the court. These decisions are not on the ground that such is the rule of those States in criminal cases, but, because the jury has been more or less affected by the illegal evidence.[4] In Drake v. State, it was observed in regard to the jury obeying the directions of the court to disregard illegal evidence, "they might endeavor to do so, and believe they were doing so, and still be involuntarily and unconsciously influenced thereby." On the other hand numerous decisions have held the error cured even in criminal cases. Some of these hold the error cured by the action of the court and principally because of no reason to think that the jury had been influenced by the improper evidence.[5] Others hold the error cured but give only the action of the court in withdrawing the evidence from the jury and giving instructions to disregard it, as the reason.[6]

In Civil Cases.—Passing to civil actions, the decisions are numerous where the error has been regarded as cured and almost as numerous where the error has not been considered cured. These cases, however, are not conflicting, for with but few exceptions the same principle underlies them all. The principle is the influence on the jury the improper evidence may have had.[7] The doctrine that the error cannot be cured was advanced in some of the earlier New York decisions.[8] The evidence erroneously admitted in these cases was not only of a tendency to influence the jury, but was in direct violation of the elementary rules for the admission of testimony.[9] In these decisions, the influence on the jury does not seem to have been considered. The later cases in the same State, have departed from the doctrine of Penfield v. Carpenter.[10] In Erben v. Lorillard, improper evidence had been admitted to prove value of plaintiff's services. This evidence was excepted to. The judge in his charge, directed the jury to disregard this evidence in determining the value of the services. The court says: "When illegal evidence properly excepted to, has been

[1] Meyer v. Lewis, 43 Mo. App. 417.

[2] Stephen's Dig. of Ev. art. 143.

[3] State v. Mix, 15 Mo. 153; State v. Daubert, 42 Mo. 242; State v. Thomas, 99 Mo. 235.

[4] People v. Wolcott, 51 Mich. 617; Drake v. State, 15 S. W. Rep. 725 (Tex.).

[5] State v. Crafton, 56 N. W. Rep. 257 (Iowa); State v. Towler, 13 R. I. 661; Miller v. State, 31 Tex. Crim. Rep. 609.

[6] Boyd v. State, 17 Ga. 194; Reitz v. State, 33 Ind. 187; Mimms v. State, 16 Ohio State, 221.

[7] Erben v. Lorillard, 19 N. Y. 299; Beck v. Cole, 16 Wis. 99.

[8] Penfield v. Carpenter, 13 Johns. 350; Irvine v. Cook, 15 Johns. 239.

[9] Graham and Waterman on New Trials, p. 620.

[10] Erben v. Lorillard, 19 N. Y. 299; Holmes v. Moffatt, 120 N. Y. 159.

received during trial, it must be shown that the verdict was not affected by it, or the judgment will be reversed. If the evidence may have affected the verdict, the error cannot be disregarded." The law of the earlier New York cases was criticised by Parker, C. J.[11] In Deerfield v. Northwood, he says: "If evidence is admitted on trial, which proves to be incompetent, and the jury are directed to disregard it, the admission furnishes no ground for a new trial, unless there is reason to believe that the evidence improperly influenced their verdict. There may be cases in which the irrelevant testimony which has been introduced, is of a nature so well adapted to make such an impression upon the minds of the jury, that instructions to disregard it, cannot well have their legitimate effect; and there may be cases where, after the admission of such testimony, the result of the trial indicates that it must have had an improper operation. If in any case there is good reason to believe that injury has been done to the adverse party by the introduction of such evidence, notwithstanding the caution and instructions of the court, that will furnish a sufficient cause for sending the case to another trial." This statement of the law applies to other States as well, whose decisions practically establish the same doctrine.[12]

Error Cured.—The cases holding the error cured may be divided into two classes. Into the first class may be grouped those in which the error is regarded as cured because the improper evidence did not affect the jury;[13] into the second class those cases where the error is deemed corrected by the action of the court, the influence on the jury not being considered.[14] In the first class the appellate court has arrived at the conclusion that the erroneously admitted evidence did not influence the jury, from various grounds. The court may be satisfied from the finding of the jury that the appellants could not have been injured by its admission;[15] the verdict rendered according to instructions;[16] other evidence upon which verdict could have been based and therefore assumed that jury gave verdict upon this competent evidence;[17] the nature of the evidence such as not calculated to operate to the injury of the defendants;[18] the evidence not of vital importance and did not make or unmake plaintiff's case.[19] In the second class of cases where the error is corrected simply by the court's directions to the jury, the prejudicial character or effect of the improper evidence does not seem to have been considered. While the earlier New York cases went to the entreme of holding an error in the admission of evidence, to be incurable, the decisions of this class go to the other extreme and hold that proper instructions accompanied by withdrawal of the evidence, removes the error. The theory upon which the curative properties of the court's action is based is that the jury will follow the directions given by the court.[20] This presumption that the minds of the jurymen are completely subordinate to the will of the court, may be useful as a presumption, but as a reason for a line of decisions, it invests the court with hypnotic power. The comments of Grove, J., in Erben v. Lorillard are in point. "It does not follow that impressions thus obtained will have no effect, although the judge directs them to disregard the evidence. A juror is never made competent by the direction of the judge to disregard any opinion he had formed previous to taking his seat. An opinion derived from illegal evidence at trial is equally prejudicial."

Error not Cured.—In many cases, where improper evidence has been admitted and the jury has been directed not to consider it, the error has not been regarded as cured and the appellate court has reversed the judgment because the improper evidence had influenced the jury,[21] or, was such as might have in-

[11] Hamblett v. Hamblett, 6 N. H. 333; Deerfield v. Northwood, 10 N. H. 269.

[12] L. B. & M. R. R. Co. v. Winslow, 66 Ill. 219; Busch v. Fisher, 89 Mich. 192; Erben v. Lorillard, 19 N. Y. 299; Dillingham v. Anthony, 73 Tex. 47; State Bank v. Dutton, 11 Wis. 389.

[13] Hogendobler v. Lyon, 12 Kan. 276; Busch v. Fisher, 89 Mich. 192; Hamblett v. Hamblett, 6 N. H. 333; Holmes v. Moffat, 120 N. Y. 159; Klein v. Thompson, 19 Ohio State, 569; Dillingham v. Anthony, 73 Tex. 47; Northampton Bank v. Balliet, 8 Watts and Sergeant, 311; Conklin v. Parsons, 2 Pinney, 264; Beck v. Cole, 16 Wis. 99; Waterman v. Railway Co., 82 Wis. 613.

[14] Alabama, etc., R. R. Co. v. Frazier, 93 Ala. 45; Smith v. Whitman, 6 Allan, 562; Union Water Co. v. Crary, 25 Cal. 504; Rowland v. Carmichael, 77 Ga. 350; Blizzard v. Applegate, 77 Ind. 527; Sullens v. R. R. Co., 74 Iowa, 659; Boone v. Purnell, 28 Md. 607.

[15] Beck v. Cole, 16 Wis. 99.

[16] Conklin v. Parsons, 2 Pinney, 264.

[17] Holmes v. Moffat, 120 N. Y. 159.

[18] Hamblett v. Hamblett, 6 N. H. 333; Dillingham v. Anthony, 73 Tex. 47.

[19] Hogendobler v. Lyon, 12 Kan. 276.

[20] Smith v. Whitman, 6 Allan, 562.

[21] Central R. R. Co. v. Vaughn, 93 Ala. 209; Tourte-

fluenced them.[22] The verdict in many of these cases show that the jury had not disregarded the evidence in question, as they should have done. In Dr. Harter Medicine Company v. Hopkins, hearsay evidence to prove a counterclaim was admitted. The court afterwards instructed the jury that such evidence as was mere hearsay should be rejected. As there was but little competent evidence to establish this counterclaim, the liberal verdict in favor of the defendant, showed that the jury, very probably, took into consideration the hearsay testimony. In Remington v. Bailey, evidence of fraudulent transactions between plaintiff and his brother was introduced by defendant. This was improperly admitted because the defendant was not in position to take advantage of it, and the court gave the usual instructions. The only defense here, was this improper evidence of fraud and some weak impeachment evidence, but the jury returned a verdict in favor of the defendant. The judgment was reversed on appeal. In State Bank of Wis. v. Dutton, evidence of an offer to settle improperly received. The erroneous admission was held not cured, though the court directed the jury to disregard it. "Now unless the jury gave this testimony some consideration, and were to a certain extent governed by it in coming to their conclusions as to the amount the respondent was entitled to recover, we are utterly at loss to account for the verdict." The English law on this subject, according to Stephen, is as follows: "A new trial will not be granted in any civil action on the ground of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action."[23]

Action Tried without Jury.—Where the action is tried by the court, without a jury, the judgment will not be reversed for errors in the admission of illegal testimony, if there is ample legal evidence to sustain the finding.[24] It is presumed in such cases that the court of its own motion, disregards all improper testimony, and bases its findings and judgments upon competent evidence only.[25]

Time of Withdrawal or Directions.—The withdrawal, or striking out, of the evidence improperly received, should take place as soon as the court is aware of the error, at least before the arguments of counsel to the jury.[26] There is a contrary doctrine expressed in a few cases, to the effect that the withdrawal or striking out, may take place at any stage of the case, because the jury is presumed to obey the court.[27] The emphatic remarks of Reed, C. J., in Tourtellotte v. Brown, on this subject, are applicable here. "Counsel cannot put immaterial, incompetent and improper evidence before a jury, allow it to remain there to the close of the trial and cure it by a formal withdrawal, which if heard by the jury, might utterly fail of comprehension and having been impressed upon the minds of the jurors, have had all the effect it could have had if competent. Such practice cannot be too severely criticised."

Who Withdraws or Strikes Out.—It sometimes happens that the party who offered the improper evidence, desires it withdrawn, and this when done with the consent of the court, becomes the act of the court and is not objectionable on that ground.[28] Sometimes the court of its own motion, strikes out the questionable evidence. Whether the court or a party moves to strike out or withdraws the evidence, is immaterial.[29] The party who has excepted to the action of the court in the admission of the improper testimony, has the right to insist upon his exception instead of waiving it when the opposite party proposes to withdraw or strike out evidence.[30] Nor is the motive of the party who attempts to withdraw or strike out evidence considered. The question is, did the withdrawal take the testimony out of the case?[31]

lotte v. Brown, 36 Pac. Rep. 73 (Colo.); L. B. & M. R. R. Co. v. Winslow, 66 Ill. 219; Stephens v. Ry. Co., 96 Mo. 207; Gillet v. Mead, 7 Wend. 193; State Bank of Wis. v. Dutton, 11 Wis. 389.

[22] Erben v. Lorillard, 19 N. Y. 299; Remington v. Baily, 13 Wis. 370; Dr. Harter Med. Co. v. Hopkins, 83 Wis. 309.

[23] Stephen's Dig. of Ev., art. 143.

[24] Laumier v. Gehner, 110 Mo. 122.

[25] Travelers' Ins. Co. v. Murray, 16 Colo. 296.

[26] Tourtelotte v. Brown, 36 Pac. Rep. 73 (Colo.); Gall v. Gall, 114 N. Y. 109; Richards v. Noyes, 14 Wis. 614; Beggs v. R. R. Co., 75 Wis. 444.

[27] Smith v. Whitman, 6 Allan, 562.

[28] State v. Towler, 13 R. I. 661.

[29] People v. Wilson, 141 N. Y. 185; Klien v. Thompson, 19 Oh. St. 569.

[30] Furst v. Second Ave. R. Co., 72 N. Y. 542.

[31] State v. Towler, *supra*.

In Conclusion.—That the evidence in a jury trial should be as free from exceptions as possible, is a self-evident truth. The tendency of such evidence is to mislead.[32] But during any trial, however well managed, errors will creep in. Evidence which at first glance was admitted as competent, proves, after consideration, clearly incompetent. Often evidence is admitted under a promise to connect it with relevant evidence afterwards. When this connecting evidence fails or is not offered, the former is illegal. If such errors, inseparable from judicial trials, should always be held incurable and thus necessitate new trials, a case once on the court calendar would be there forever. Therefore, courts favor the correction of errors rather than their perpetuation.[33] It is true that it is impossible for any human tribunal to correctly judge the influence the improper evidence may have had on the jury, in every case. It may have poisoned their minds, unconsciously to themselves perhaps. Generally, however, the appellate court can judge from the character of the improper evidence, the parties, the subject of the action, the relief sought and the verdict rendered, whether or not the jury has been influenced and the verdict affected.

La Crosse, Wis. LOUIS M. LARSON.

[32] L. B. & M. R. R. Co. v. Winslow, 66 Ill. 219.
[33] Holmes v. Moffatt, *supra*.

LIFE INSURANCE—WARRANTY AGAINST SUICIDE—SUICIDE WHILE INSANE.

THE MUTUAL LIFE INSURANCE CO. V. LEBRIE.

United States Circuit Court of Appeals, January, 1896.

1. Death by suicide of the assured is not "death by his own hand," within the meaning of a condition whereby a policy of life insurance is to be void in that event, if, at the time of taking his life, the assured's reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences and effect of the act, or when he was impelled thereto by an insane impulse which he had no power to resist.

2. It need not be alleged in the complaint that the assured died by suicide, but was insane when he committed the act.

3. The testimony of non-professional witnesses, persons who were acquainted with the assured in respect to his actions and apparent mental condition just prior to his death, and their impressions as to his sanity, are competent as tending to show the mental condition of the assured at the time of his death.

WALLACE, C. J.: This is a writ of error brought by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury.

The action was on a policy of life insurance issued by the defendant February 3, 1890, to Jay C. Leubrie, and payable to him on the 3d day of February, 1905, if then living, or if he should die before that time to a sister, the plaintiff. The policy was based upon and recites that it was issued in consideration of an application in writing signed by Jay C. Leubrie, which, among other things, contained a warranty that he would not die by his own hand during the period of two years following the issue of the policy. He died within two years by suicide. The principal defense to the action was the breach of this warranty. Upon the trial evidence was introduced on behalf of the plaintiff tending to show that the deceased was insane at the time he committed suicide. The trial judge instructed the jury, among other things, that it was incumbent upon the plaintiff to establish by a fair preponderance of proof that at the time the assured committed suicide his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences and effect of the act, or that he was impelled thereto by an insane impulse which he had not the power to resist; and, if this was established, that his death was not by his own hand within the meaning of the warranty. Exceptions were taken by the defendant which present the question whether this instruction was correct, and also whether there was sufficient evidence to authorize a finding by the jury that the deceased was insane when he committed suicide. Since the case of Life Insurance Co. v. Terry 15 Wall. 580, it has been perfectly well settled in the courts of the United States that death by the suicide of the assured is not "death by his own hand" within the meaning of a condition whereby the policy is to be void in that event, if, at the time of taking his own life, his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences and effect of the act, or when he was impelled thereto by an insane impulse which he had not the power to resist. The doctrine of that case has been repeatedly reaffirmed by the supreme court. Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284; Charter Oak Life Ins. Co. v. Rodel, 96 U. S. 232; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121; Accident Ins. Co. v. Crandel, 120 U. S. 527. Inasmuch as the instruction of the trial judge was an exact statement of this proposition, its correctness cannot be impeached unless there is a legal distinction between the effect of such a condition when recited in the policy and when made the subject of a warranty in an application upon which the policy is founded. There is no such distinction. In

either case there is a stipulation upon the literal fulfillment of which the validity of the contract depends; and in either the policy is to be void in the event of a breach—a result which, by the condition, is expressly, and by the warranty, is impliedly, assented to. Treating it as a condition precedent, performance of which must be averred in the complaint and affirmatively established in proof by the party who sues upon the policy, the averment is proved if the evidence shows that the assured was insane when he committed suicide.

It was unnecessary for the plaintiff to allege in her complaint that the assured died by suicide, but was insane when he committed the act. It is not necessary to state the facts constituting performance of a condition precedent, and a general averment that it was duly performed is all that is requisite. Code of Civil Procedure, section 553. The complaint of the plaintiff contained this averment; consequently there was no error in the ruling of the trial judge upon the question of pleading.

Although there was no controversy as to the sufficiency of the proofs of death, and they were received in evidence without any objection on the part of the defendant, the plaintiff was allowed to show, against the objection of the defendant, that when they were presented she did not know whether assured was sane or insane. Error is assigned of this ruling. It suffices to dispose of this assignment that no ground of objection to the evidence was assigned. The testimony of non-professional witnesses, persons who were acquainted with the assured, in respect to his actions and apparent mental condition just prior to his death, and their impressions as to his sanity, was allowed against objection on the part of the defendant, and error is assigned of this ruling. The competency of such evidence was affirmed in Charter Oak Life Ins. Co. v. Rodel, in this language: "Although such testimony from ordinary witnesses may not have great weight with experts, yet it was competent testimony and expressed in an inartificial way the impressions which are usually made by insane persons upon people of ordinary understanding." In Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 612, the question of the competency of such evidence was fully considered and its reception approved.

The evidence tended to show that within a few weeks of his death the assured was a bright, shrewd, joyful man. He was a merchant, about thirty-three years of age, unmarried, and doing a prosperous business. Suddenly, without any apparent cause, he became melancholy and despondent; thought he was sick and was going to die; complained of pains in his legs and in his toes, and other ailments; almost every night would get up from his bed and walk the room; became inattentive to his business. The physician who attended him after these symptoms intervened could not discover that he was sick, and testified that there was no organic trouble, and that he was physically in usual good health, and that "the greatest trouble I had with him was to convince him that he was not sick;" that "he was always right when I left him, but I always found him in a melancholy mood." Several days before his death he attempted to commit suicide by taking laudanum. The night of his death, after the family with whom he lived had retired, he left his room in his night clothes, proceeded to the back yard of the premises, and there gashed himself on his wrists and neck in several places with a razor, and, although bleeding profusely, went back to his room and thence a considerable distance to the Arkansas river, where he drowned himself.

Notwithstanding there was evidence to show that he was rational in his conversation, and perhaps preponderating evidence tending to overthrow the theory of his insanity, we cannot doubt that the case presented a fair question for the decision of the jury, and that the trial judge was not only justified in submitting it to them, but that it would have been error if he had refused to do so.

Error is assigned of the refusal of the judge to instruct the jury as requested on behalf of the defendant, that the opinion of a physician, a witness for the plaintiff, who had testified that the deceased was insane, but that the opinion was wholly founded upon the fact of suicide, should be disregarded by the jury. The court had previously instructed the jury that suicide was not of itself evidence of insanity. To have granted the instruction would have been in effect but to repeat the instruction which had already been given. Under the circumstances the disposition of the request was matter which rested wholly in the discretion of the court.

We find no error in the rulings at the trial and the judgment is accordingly affirmed.

NOTE.—I. *In Absence of Provision Against Suicide in Policy.* 1. Where Policy is for Benefit of Assured.—In the absence, in a policy of life insurance, of a provision stipulating against self-destruction by the assured, in those cases where the policy is for the benefit of the assured, suicide by the assured while sane, that is, conscious self-murder, will avoid the insurance: (1) because of the fraud practiced upon the insurance company, and (2) because against public policy as tending to encourage suicide. See Supreme Commandery Knights Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 333, 335; Chandler v. Worcester Mutual F. Ins. Co., 57 Mass. (3 Cush.) 328; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386; Hartman v. Keystone Ins. Co., 21 Pa. St. 466, 1 Big. L. Ins. Cas., 649; Bank of Oil City v. Guardian Mutual Ins. Co., 6 Leg. Gay. 348, 5 Big. L. Ins. Cas. 478; Waters v. Merchants' Louisville Ins. Co., 36 U. S. (11 Pet.) 213; bk. 9, L. ed. 691; Amicable Ins. Co. v. Bolland (Fauntleroy's Case), 2 Dow. & C. 1; Moore v. Woolsey, 4 El. & Bl. 243, 82 Eng. C. L. 242, 28 Eng. L. & Eq. 248, 24 L. J. Q. B. 40, 1 Jur. (N. S.) 468; Horn v. Anglo-Australian & U. Fam. Ins. Co., 7 Jur. (N. S.) 673. Lord Chief Justice Campbell says, in Moore v. Woolsey, *supra*, that "if a man insures his life for a year, and then commits suicide within the year, his executors cannot recover on the policy, as the owner of a ship, who insures her for a year, cannot recover upon the policy if, within the

year, he causes her to be sunk; a stipulation that, in either case, upon such an event, the policy should give a right of action, would be void." In the case of Supreme Commandery Knights Golden Rule v. Ainsworth, *supra*, after quoting the above language of Lord Justice Campbell, the court say: "In Amicable Ins. Soc., 2 Dow. & C. 1 (known as Fauntleroy's Case) it was held by the House of Lords, that though there was not in the policy an exception of the liability of the insurer, in the event the insured came to his death by the hands of public justice, the exception would be implied for the reason that an express contract for liability in that event would contravene good morals and sound policy. The inference or implication of the law, therefore, was that the execution of the assured by the hands of public justice, for the commission of crime, is not within the risk of the policy. A construction or an implication which will preserve the legality of a contract is preferred to one which will have the opposite effect. Referring to Fauntleroy's Case, it was said by Wood, V. C., in Horn v. Anglo-Australian & U. Fam. L. Ins. Co., 7 Jur. (N. S.) 673: 'The argument might be pressed, although I do not know that any case has so decided, to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing a felony and losing his life thereby.' In Hartman v. Keystone Ins. Co., 21 Pa. St. 466, Black, C. J., said, that though the policy was silent in reference to self-destruction, if the accused committed suicide he was guilty of such a fraud upon the insurer of his life that his representatives cannot recover for this reason alone. Hunt, J., however, said of this case, in Mutual L. Ins. Co. v. Terry, 82 U. S. (15 Wall.) 580, 586, bk. 21, L. ed. 236, 240, that it was in this respect 'confessedly unsound.' The case, in its entirety, is not supported by the current of authority. · · · In all contracts of insurance there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property or health or life, is usually subject to, and the assured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud or the criminal misconduct of the assured is, in contracts of marine or fire insurance, an implied exception to the liability of the insurer. Waters v. Merchants' Louisville Ins. Co., 36 U. S. (11 Pet.) 213; bk. 9, L. ed. 631; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386; Chandler v. Worcester Mutual F. Ins. Co., 57 Mass. (3 Cush.) 328. Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties, that the assured, by his own criminal act, shall deprive the contract of its material element, shall vary and enlarge the risk and hasten the day of payment of the insurance money." Upon a similar principle it has been held that a death caused by an abortion voluntarily procured by the assured, without sufficient medical cause, resulting in death, will vitiate the contract of insurance, on the ground of public policy. See Hatch v. Mutual L. Ins. Co., 120 Mass. 550, 552, 21 Am. Rep. 541, 2 Bost. Rep. 362. The court say: "We are of the opinion that no recovery can be had in this case because the act, on the part of the assured, causing death, was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we have no question that a contract to insure a woman against the risk of her dying under, or in consequence of, an illegal operation for abortion, would be contrary to public policy, and could not be enforced in the courts of this commonwealth. See Amicable Soc. v. Bolland, 4 Bligh N. R. 194; Horn v. Anglo-Australian Assurance Co., 30 L. J. (N. S.) Ch. 511; Moore v. Woolsey, 4 El. & Bl. 243, 82 Eng. C. L. 242, 28 Eng. L. & Eq. 248, 24 L. J. Q. B. 40, 1 Jur. (N. S.) 468."

2. Where Policy for Benefit of Assured has Been Assigned.—But the rule is different where the policy has been taken for the benefit of the assured, and he assigns or pledges it for a valuable consideration. In the case of Moore v. Woolsey, *supra*, it is said that "where a man insures his own life, we can discover no illegality in a stipulation that, if the policy should be afterwards assigned *bona fide* for a valuable consideration, or a lien upon it should afterwards be acquired *bona fide* for a valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned." This is on the general principle treated in the next section.

3. Where Policy for Benefit of Wife and Children.—In those cases where a policy is taken out on the life of the husband for the benefit of the wife and children, his subsequent suicide will not vitiate the policy as to them, in the absence of any condition of forfeiture in case of suicide, for the reason that the beneficiaries are not bound by the acts of the assured after the insurance was effected. See Fitch v. American Popular Ins. Co., 59 N. Y. 577, 17 Am. Rep. 372, 11 Alb. L. J. 91.

II. *Provisions in Policy Against Self-destruction.* 1. The Conflict.—There seems to be an almost hopeless conflict in the decided cases as to whether or not self-destruction, induced by insanity, is within a stipulation against suicide in a policy of insurance; and if not, what kind and degree of insanity will prevent a forfeiture. Chief Justice Pierpoint says, in the case of Hathaway v. National Life Ins. Co., 48 Vt. 335, that none of the decisions successfully lay down the line of demarkation between those cases in which the insanity would prevent the forfeiture and those in which it would not.

2. The English Rule.—The question first came before the English courts in the case of Borradaile v. Hunter, 5 Man. & G. 639, 44 Eng. C. L. 335, 7 Jur. 443, 12 L. J. C. P. 225, 2 Big. L. & Acc. Cas. 280, decided in 1843. In that case a life policy of insurance contained a proviso (*inter alia*) that in case "the assured should die by his own hands, or by the hands of justice, or in consequence of a duel," the policy should be void. The assured threw himself into the Thames and was drowned. Upon an issue whether the assured died by his own hands, the jury found that he "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but at the time of committing the act he was not capable of judging between right and wrong." The court held that if the assured knew, when the suicidal act was done, that his life would be destroyed thereby, and intended it to be so, the act vitiated the policy under the condition, even though the assured was insane at the time, and incapable of distinguishing as to the right or wrong, or moral character of the consequences, in the act he was doing. The rule laid down in this case has ever since been followed by the English courts. See White v. British Empire Assur. Co., L. R. 7 Eq. 394, 19 L. T. (N. S.) 308, 38 L. J. Ch. 53; Eufaur v. Professional Life Assn. Co., 25 Beav. 99, 4 Jur. (N. S.) 841, 27 L. J. Ch. 817: Dorman v. Borradaile, 5 Man. G. & S. (3 C. B.) 380, 57 Eng. C. L. 379; Clift v. Schwabe, 3 Man. G. & S. (3 C. B.) 437, 54 Eng. C. L. 346. According to those decisions, to

take a case out of the proviso, the party must have been insane to such a degree as to render him unconscious that the act he did would cause his death, or he must have committed it under the influence of some insane impulse which he could not resist. His mind must have been so far gone that it was not moving to the act. It is not sufficient that his moral sense was so impaired as to deprive the act of its criminal character. See Van Zandt v. Mutual Benefit L. Ins. Co., 55 N. Y. 169, 173.

3. The American Rule.—The question first came before the courts of this country in the case of Breasted v. The Farmers' Loan & Trust Co., 4 Hill (N. Y.), 73, decided in 1843, and affirmed on appeal. 8 N. Y. 299, 59 Am. Dec. 482. In this case it was held that a provision that a life insurance policy shall be void if the assured "die by his own hand," imports an act of criminal self-destruction, and this is, in substance, the prevailing doctrine of this country, and is supported by the decided cases of the Supreme Court of the United States. The question was first presented to that court in the case of Mutual Life Ins. Co. v. Terry, 82 U. S. (15 Wall.) 580; bk. 21, L. ed. 236, in which Mr. Justice Hunt said: "The question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or a court would have been justified in pronouncing it invalid. A will, then made by him, would have been rejected by a surrogate if offered for probate. If, upon trial for a criminal offense, upon all the authorities, he would have been entitled to a charge, that upon the proof of the facts assumed, the jury must acquit him. Freeman v. People, 4 Den. (N. Y.) 9; Willis v. People, 32 N. Y. 719; Seaman's Soc. v. Hopper, 33 N. Y. 619; Winchester's Case, 6 Coke, 23; Combe's Case, Moore, 759. We think a similar principle must control the present case, although the standard may be different. We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable." This decision has been followed in a number of cases, and doubted or questioned in none, though distinguished in some. See Merritt v. Cotton States L. Ins. Co., 59 Ga. 564, 55 Ga. 103; Life Association of America v. Waller, 57 Ga. 533; Phillips v. Louisiana Eq. L. Ins. Co., 26 La. Ann. 404, 21 Am. Rep. 549; Eastbrook v. Union Mut. L. Ins. Co., 54 Me. 224, 89 Am. Dec. 743; John Hancock Mut. L. Ins. Co. v. Cooper, 34 Mich. 41; Scheffer v. National L. Ins. Co., 25 Minn. 534, 8 Ins. L. J. 337; Connecticut Mut. L. Ins. Co. v. Groom, 86 Pa. St. 92, 27 Am. Rep. 689, 7 Ins. L. J. 597; Phadenhauer v. Germania L. Ins. Co., 7 Heisk. (Tenn.) 567, 19 Am. Rep. 623; Hathaway v. National L. Ins. Co., 48 Vt. 335; Accident Ins. Co. of N. A. v. Crandal, 120 U. S. 527, 531; bk. 30, L. ed. 740, 742; Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121; bk. 21, L. ed. 878; Charter Oak Ins. Co. v. Rodel, 95 U. S. 232; bk. 24, L. ed. 433; Bigelow v. Berkshire Ins. Co., 93 U. S. 284; bk. 23, L. ed. 918, 19 Am. Rep. 628*n*; Waters v. Connecticut Mut. L. Ins. Co., 2 Fed. Rep. 892, 9 Ins. L. J. 337; Moore v. Connecticut L. Ins. Co., 3 Fed. Rep. 444, 4 Big. L. & Acc. Cas. 138; Hiatt v. Mutual L. Ins. Co., 2 Dill. C. C. 572; Coverston v. Connecticut Mut. L. Ins. Co., 1 Am. L. T. (N. S.) 239, 4 Big. L. & Acc. Ins. Cas. 169; Jarvis v. Connecticut Mut. L. Ins. Co., 5 Ins. L. J. 507, 6 *Id.* 311. In the case of Manhattan L. Ins. Co. v. Broughton, *supra*, Mr. Justice Gray says: "The most important question in the case is whether a self-killing by an insane person, having sufficient capacity to understand the deadly nature and consequences of his act, but not its moral aspect and character, is a death by suicide, within the meaning of the policy. This is the very question that was presented to the court in 1872 in the case of Mutual L. Ins. Co. v. Terry. At that time there was a remarkable conflict of opinion in the courts of England, in the courts of the several States, and in the circuit courts of the United States, as to the true interpretation of such a condition. All the authorities agreed that the words "die by suicide," or "die by his own hand," did not cover every possible case in which a man took his own life, and could not be held to include the case of self-destruction in a blind frenzy or under an overwhelming insane impulse. Some courts and judges held that they included every case in which a man, sane or insane, voluntarily took his own life. Others were of the opinion that any insane self-destruction was not within the condition," and ending by laying down the doctrine that "a self-killing by an insane person, understanding the physical nature and consequences of his act, but not its moral aspect, is not a death by suicide, within the meaning of a condition in a policy of insurance upon his life, that the policy shall be void in case he shall die by suicide, or by the hands of justice, or in consequence of a duel, or of the violation of any law."

4. Limitation of the American Rule.—The American cases are not all harmonious. The doctrine, as laid down in the case of Breasted v. Farmers' L. & T. Co., and approved by the Supreme Court of the United States in the case of Mutual L. Ins. Co. v. Terry, has been somewhat modified by later New York decisions. Thus, in Van Zandt v. Mutual Benefit L. Ins. Co., 55 N. Y. 169, it is held that where a policy of life insurance contains the usual condition declaring it void in case the assured shall die by his own hand, the only exceptions to the condition are where self-destruction is clearly shown to be accidental or involuntary; to take a case out of the proviso, on the ground of insanity, the assured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the impulse of an insane impulse which he could not resist; it is not sufficient that his mind was so impaired that he was not conscious of the moral obliquy of the act. The court say: "I do not find that any of the cases have gone so far as to adjudicate that the mere want of capacity to appreciate the moral wrong involved in the act, where it was voluntary and intentional, unaccompanied by any want of appreciation of its physical nature and consequences, or by any insane impulse or want of power of will or self-control, is sufficient to take a case out of the proviso. The contrary has been held in several cases, and the doctrine of Barradalie adopted. Dean v. American Mut. L. Ins. Co., 86 Mass. (4 Allen) 101; Cooper v. Massachusetts Mut. L. Ins. Co., 102 Mass. 227, 3 Am. Rep. 453; Nimick v. Mutual Benefit L. Ins. Co., 3 Brewst. (Pa.) 502, 3 Pittsb. Rep. 293; 1 Big. L. & Acc. Ins. Cas. 758; 10 Am. L. Reg. (N. S.) 102; Gay v.

Union Mut. L. Ins. Co., 9 Blatch. C. C. 142, 2 Big. L. & Acc. Ins. Cas. 4; Wharton & Stille Med. Jur., § 240; Fowler v. Mutual L. Ins. Co., 4 Lans. (N. Y.) 202. In the case of St. Louis Mut. L. Ins. Co., 6 Bush (Ky.), 268, the Court of Appeals of Kentucky was equally divided." See also Penfold v. Universal L. Ins. Co., 85 N. Y. 317, 321; Newton v. Mutual Benefit L. Ins. Co., 76 N. Y. 426, 429; Weed v. Mutual Benefit L. Ins. Co., 70 N. Y. 561, 563; De Gogorza v. Knickerbocker L. Ins. Co., 65 N. Y. 232, 248. Earl, J., in his dissenting opinion in De Gogorza v. Knickerbocker L. Ins. Co., *supra*, says, in speaking of the Van Zandt Case: "In the latter case the law, as announced in the English cases, was followed, and hence in this State, whatever doubt there may have been before, it must now be regarded as settled that when a policy contains a proviso that it shall be void in case the assured shall die by his own hand, a death by the voluntary, intentional act of the insured, whether he was sane or insane, avoids the policy; but self-destruction by the assured when his mind was so disordered that he did not know that the act committed would cause death, when he could form no intention and be influenced by no motive, or when he was under the influence of some insane impulse which he could not resist, does not avoid the policy."

The doctrine announced in the later New York decisions seems to be that of the courts of Massachusetts and Pennsylvania. See Cooper v. Massachusetts Mut. L. Ins. Co., 102 Mass. 227, 3 Am. Rep. 453; 1 Big. L. & Acc. Ins. Cas. 758; Dean v. American Mut. L. Ins. Co., 86 Mass. (4 Allen) 101; Connecticut Mut. L. Ins. Co. v. Groom, 86 Pa. St. 92, 27 Am. Rep. 689, 6 Bost. Rep. 376; American Life Ins. Co. v. Isett, 74 Pa. St. 176, 2 Ins. L. J. 825, 4 Big. L. & Acc. Ins. Cas. 422; Nimick v. Mutual Benefit L. Ins. Co., 3 Brewst. (Pa.) 502, 3 Pittsb. Rep. 293, 10 Am. L. Reg. (N. S.) 02, 1 Big. L. & Acc. Ins. Cas. 758; Gay v. Union Mut. L. Ins. Co., 9 Blatchf. C. C. 142, 2 Big. L. & Acc. Ins. Cas. 4.

JAMES M. KERR.

HUMORS OF THE LAW.

"No," said the great student of sociology, thoughtfully, "I do not consider this man a criminal."

"Not a criminal?" exclaimed the man of unscientific mind.

"I consider him very far from being one."

"But think of what he did?"

"I do. That is why I have came to this conclusion."

"He committed murder, didn't he?"

"Legally, I suppose he did."

"The deed was absolutely fiendish in its cruelty."

"I admit that."

"Four people died horrible deaths as a result of his deliberate act."

"That's quite true."

"Then if he is not a criminal, there are none."

"On the contrary there are a great many of them. The shoplifter in the next cell is a criminal. So is the fellow on the other side who assaulted a man with a slungshot. But it is absurd to call this man a criminal."

"Then what is he?"

"He is a degenerate."

"Oh, yes, of course," returned the man of unscientific mind. "I forgot that science had made such great strides of late, and so I failed to apply the usual test."

"The usual test?" repeated the student, inquiringly.

"Yes. As I understand it, a criminal becomes a degenerate when he does something for which he ought to hang."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTION—Who may Maintain.—L, being the owner of certain notes and chattel mortgages executed by J, assigned them, in absolute terms, to S, for the purpose of enabling him, by action thereon, to compel J to pay a debt owing by him to S. If the proceeds were collected, they were to be turned over to L: Held, that for such purpose S was a trustee of an express trust, and might maintain an action in his own name.—STRUCKMEYER V. LAMB, Minn., 65 N. W. Rep. 930.

2. ADMIRALTY JURISDICTION — Maritime Contract—Storage of Grain in Vessel.—A contract made near the close of the season of lake navigation for the shipment of a cargo of grain from Chicago to Buffalo, the grain to be stored in the vessel at Buffalo until the following spring, is not maritime in character in respect to the provision for such storage; and admiralty has no jurisdiction of a suit for damage to the grain during the storage.—THE RICHARD WINSLOW, U. S. C. C. of App., 71 Fed. Rep. 426.

3. APPEAL OR ERROR—Review.—If the judgment which the litigant seeks to have reviewed is appealable, he may have it reviewed on appeal or error, at his election, and he may make such election at any time before the final submission of the case in this court. He may dismiss his appeal and stand on his petition in error, or *vice versa*. But if he makes no such election, this court will review the judgment of the district court on error, when there is filed with the transcript a petition in error.—BEATRICE PAPER CO. V. BELOIT IRON WORKS, Neb., 65 N. W. Rep. 1059.

4. ATTACHMENT—Civil Action.—An action for money lost at gambling on defendant's premises is a civil action for the recovery of money within the meaning of the attachment law of Ohio.—JENKS V. RICHARDSON, U. S. C. C. (Ohio), 71 Fed. Rep. 386.

5. ATTACHMENT — Interpleader—Sale of Property.—Where seven separate attachment suits are begun against an insolvent debtor, and a creditor files an interplea in each, claiming the property attached, which, by consent of all plaintiffs, is sold, the proceeds to await the order of the court, no disposition of such proceeds can be made till all of the suits have been determined.—STATE v. HOCKADAY, Mo., 33 S. W. Rep. 812.

6. ATTORNEY AND CLIENT—Action—Dismissal.—The general employment of an attorney to prosecute an action does not confer on him the power to dismiss it.—RHUTASEL v. RULE, Iowa, 65 N. W. Rep. 1013.

7. BANKS—Proceeds of Mortgaged Chattel—Deposit in Bank.—In an action by a chattel mortgagee against a bank for the proceeds of mortgaged property, deposited by the mortgagor (the bank's cashier) to his account, and applied by the bank to its own debt due from the cashier, the admission of declarations of the mortgagor, while acting as such cashier, that the application was without his consent, and that he made the deposit in good faith for the mortgagee, on the issue as to whether the bank had notice, if error, is harmless, where the same facts have been testified to on trial by the cashier and another witness without objection.—ROCK SPRINGS NAT. BANK v. LUMAN, Wyo., 43 Pac. Rep. 514.

8. CARRIERS OF GOODS — Contracts — Authority of Local Agents.—It being out of the usual course of business, the presumption is that a local station agent has no power to bind his company by a contract to ship property over connecting lines of railway, and such authority will not be inferred from the mere fact that the freight for the entire distance was collected by such agent.—COATES v. CHICAGO, M. & ST. P. RY. CO., S. Dak., 65 N. W. Rep. 1067.

9. CHATTEL MORTGAGE—Book Accounts—Description.—A mortgage of book accounts, describing them as "all books of account, and accounts and notes, contracted and to be contracted from the sale of merchandise" theretofore mortgaged, and described as situated in a certain building, sufficiently describes the accounts as between the mortgagee and third persons.—DAVIS v. PITCHER, Iowa, 65 N. W. Rep. 1005.

10. CHATTEL MORTGAGES—Failure to Record.—By the provisions of § 4879, Comp. Laws, a chattel mortgage, executed and delivered, but not properly deposited in the office of the register of deeds of the county, is void, as against the creditors of the mortgagor, who became such while such chattel mortgage was withheld from the record.—NOYES v. BRACE, S. Dak., 65 N. W. Rep. 1071.

11. CONDEMNATION OF LAND FOR BRIDGE.—A city having condemned one of plaintiff's lots for the purpose of building a viaduct which would pass over said lot, plaintiff is entitled to compensation for the value of said lot, and for the depreciation in the value of his adjoining lots; it appearing that the plans for said viaduct had been made before the condemnation, and the erection thereof completed before the trial of the action for damages.—ORTH v. CITY OF MILWAUKEE, Wis., 65 N. W. Rep. 1029.

12. CONSTITUTIONAL LAW — Appropriations. — Acts passed in violation of Const. art. 10, § 16, prohibiting the general assembly from making appropriations or authorizing expenditures in excess of constitutional limits, are void, and create no indebtedness against the State.—PARKS v. COMMISSIONERS OF SOLDIERS' & SAILORS' HOME, Colo., 43 Pac. Rep. 542.

13. CONSTITUTIONAL LAW—Marine Insurance—Foreign Companies.—If a party, while in the State, takes out an open policy in a marine insurance company, domiciled out of the State, and which has not complied with the laws of the State for doing business within its territory, covering property situated within the State, he is liable to the penalty imposed by statute.—STATE v. ALLGEYER, La., 18 South. Rep. 904.

14. CONSTITUTIONAL LAW—Special Legislation.—After the legislature, in pursuance of Const. art. 11, § 6, providing that it shall classify municipal corporations in proportion to population, had made a classification, the first class of which comprised those containing 100,000 inhabitants or over, Act March 28, 1895, providing for the appointment of a board of election commissioners in municipalities having a population of over 150,000 inhabitants, was passed: Held, that the act was unconstitutional, as special legislation.—DENMAN v. BRODERICK, Cal., 43 Pac. Rep. 516.

15. CONSTITUTIONAL LAW—Title—Game Law.—Section 2171, Gen. St. 1894, making it a misdemeanor for any person to have in his possession, within this State, any game or fish which has been captured in or shipped out of any other State or country in violation of the laws thereof, is unconstitutional, because its subject-matter is not expressed in the title of the act whereof it is a part, as required by § 27, art. 4, of the State constitution.—KEITH v. CHAPEL, Minn., 65 N. W. Rep. 940.

16. CONTRACT.—A contract in the form of an order for goods given to a traveling salesman, and accepted by him, though originally conditional and dependent on approval by the company which he represented, becomes binding on it by reason of its failure to repudiate till twelve days after submission thereof to it; it never having intended to accept and fill the order.—BLUE GRASS CORDAGE CO. v. LUTHY, Ky., 33 S. W. Rep. 835.

17. CONTRACT—Mutuality.—Alleged want of mutuality in an agreement guarantying the performance of the contract of another is no defense, where the contract had become executed.—WHEELER & WILSON MFG. CO. v. LYON, U. S. C. C. (Minn.), 71 Fed. Rep. 374.

18. CONTRACT—Parol Evidence.—The rule as to the inadmissibility of parol evidence to contradict or vary the terms of a written instrument is not violated by proving the existence of any separate oral agreement as to any matter on which the instrument is silent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the instrument to be a complete and final statement of the transaction between them.—HAND v. RYAN DRUG CO., Minn., 65 N. W. Rep. 1081.

19. CONTRACT — Performance.—A building contract provided that, on failure of the contractor to properly complete the work, the owner of the building could himself correct defective work, and deduct the cost thereof from the contract price. The contractor having laid defective flooring, the owner corrected the defective work at the cost of two per cent. of the contract price: Held, that thereafter the owner could not defeat a recovery of the contract price, less damages for the omission, on the ground of non-performance.—CHARLES v. E. F. HALLACK LUMBER & MANUFACTURING CO., Colo., 43 Pac. Rep. 548.

20. CONTRACT—Testamentary Sale.—A provision in a deed stating that the grantee is to have all the grantor's personal estate at his death, after payment of all past debts and charges, if sustained by a valuable consideration, is not against public policy, and will be enforced.—PETERBOROUGH SAV. BANK v. HARTSHORN, N. H., 33 Atl. Rep. 730.

21. CONTRACTS — Waiver.—Where one who has contracted for a new machine accepts one which he knows to have been used, he thereby waives objection to it on that ground.—AULTMAN-TAYLOR MACHINERY CO. v. RIDENOUR, Iowa, 65 N. W. Rep. 980.

22. CORPORATION — Directors—Stockholder.—While, as a general rule, an action to protect corporate interests must be brought by the corporation itself, still, the right of stockholders to bring such action in their individual names is recognized, where the corporation, by its directors, refuses to bring the action, or where their conduct is such as to be equivalent to a refusal.—LOFTUS v. FARMERS' SHIPPING ASS'N, S. Dak., 65 N. W. Rep. 1076.

23. CORPORATION—Evidence as to Action of Directors.—An instrument, in form a certified copy of a resolution by the board of directors of a corporation, duly attested by the signatures of the president and secre-

tary, under the corporate seal, ratifying the execution of a mortgage, and sent to the mortgagee, is presumably the act of the corporation, and admissible in evidence to prove the ratification, without proof of the loss of the corporate record of such resolution.—PURSER V. EAGLE LAKE LAND & IRRIGATION CO., Cal., 43 Pac. Rep. 523.

24. CORPORATIONS—Filing of Articles of Incorporation.—The failure of a corporation to file a copy of its articles of incorporation in a county where it has property, and in which it brings an action, as required by Civ. Code, § 299, does not affect its cause of action, and can only be taken advantage of by plea in abatement.—CAL. SAV. & LOAN SOC. V. HARRIS, Cal., 43 Pac. Rep. 525.

25. CORPORATION — Stock Certificate — Transfer.—A corporation is not estopped from asserting a lien on stock for a debt due it, as against a transferee thereof, by the fact that the certificate states that the shares are "transferable personally or by attorney on the books of the company," without any reference to such a lien.—NATIONAL BANK OF THE REPUBLIC V. ROCHESTER TUMBLER CO., Penn., 33 Atl. Rep. 748.

26. CORPORATIONS—Ultra Vires.—A State bank which, under its charter, had power to accept stock in a national bank as security for a loan, or to acquire such stock by levy and sale under execution to satisfy a debt due to it, but which had no power to purchase such stock as an investment, purchased shares of the stock of a national bank, which were transferred to it on the books of the national bank. The latter bank subsequently became insolvent, and an assessment upon the stockholders was made by the comptroller of the currency, payment of which was resisted by the State bank on the ground that the purchase of the stock was *ultra vires*: Held that, as the purchase of the stock was merely the exercise, for an unauthorized purpose, of a power existing for other and legitimate purposes, the defense of *ultra vires* was not available.—CITIZENS' STATE BANK OF NOBLESVILLE V. HAWKINS, U. S. C. C. of App., 71 Fed. Rep. 369.

27. COURTS—International Comity.—Plaintiff entered the service of the defendant railway company in the republic of Mexico, and while in such employment was injured in that country, as is alleged, through defendant's negligence. The laws of Mexico governing liability for negligence, and also the procedure for their enforcement, differ essentially from those of Texas, and many of the provisions of the law of that country could not be enforced: Held that, the laws of Mexico having been proven, and the fact established that defendant still owns and operates its railway therein, and is subject to the jurisdiction of its courts the courts of Texas will refuse to take jurisdiction of an action to recover for the injury.—MEXICAN NAT. R. CO. V. JACKSON, Tex., 33 S. W. Rep. 858.

28. CRIMINAL LAW — Confessions.—Where defendant, while under arrest, but not under indictment, is used as a witness for the State, and also makes statements as to the crime to an officer, and no warning whatever was given him, as required by Code Cr. Proc. art. 750, neither the evidence at the trial nor the confession is admissible on a subsequent trial of an indictment against him for the same offense.—GILDER V. STATE, Tex., 33 S. W. Rep. 867.

29. CRIMINAL LAW—Grand Jury—Charge of Court.—It is error for the court, when the grand jury asks to be discharged, in directing them to return and investigate violations of the temperance law, to state that he feels sure evidence can be obtained warranting them in returning indictments for such violations, and that he does not believe that they, as citizens, can justify themselves in going to their homes without making an attempt to bring the guilty parties to justice.—STATE V. WILL, Iowa, 65 N. W. Rep. 1010.

30. CRIMINAL LAW—Murder.—Where defendants are tried together under an indictment for murder in the first degree, an instruction that it is necessary to find both actuated by express malice, before they could both be found guilty, is proper.—MOOTRY V. STATE, Tex., 33 S. W. Rep. 877.

31. CRIMINAL LAW — Murder—Malice.—In a prosecution for murder, expressions of ill will by defendant towards deceased, made seven months before the homicide, are admissible to show malice.—TUTTLE V. COMMONWEALTH, Ky., 33 S. W. Rep. 828.

32. CRIMINAL LAW — New Trial — Newly-discovered Evidence.—Where, in a prosecution for rape, a witness testified that he and another person saw defendant having copulation with prosecutrix, a new trial should be granted for newly-discovered evidence consisting of the denial of such other person that he saw such act.—OWENS V. STATE, Tex., 33 S. W. Rep. 875.

33. CRIMINAL LAW—Trial—Presence of Accused.—It was error, in the trial of a criminal case, to permit the solicitor general to proceed with his argument to the jury while the accused was absent and confined in jail, he not having been admitted to bail. This is true, although the presiding judge was not actually aware of the prisoner's absence, it not appearing that any waiver of his presence, express or otherwise, had been made, either by himself or his counsel. Because of such error, a new trial should be granted.—TILLER V. STATE, Ga., 23 S. E. Rep. 825.

34. CRIMINAL TRIAL — Embezzlement.—Under Const. art. 6, § 19, prohibiting judges from instructing in criminal cases as to the matters of fact, an instruction to the jury on defendant's testimony that in "weighing his testimony you are to consider what he has at stake. You are to consider the temptations brought to bear upon a man in his situation, to tell a falsehood for the purpose of inducing you to acquit him or to disagree," is ground for reversal.—PEOPLE V. VAN EMAN, Cal., 43 Pac. Rep. 521.

35. DEED—Acknowledgment.—The acknowledgment of a deed cannot be taken by a grantee or party interested therein.—FLORIDA SAVINGS BANK & REAL ESTATE EXCHANGE V. RIVERS, Fla., 18 South. Rep. 850.

36. EQUITY — Agency—Accounting.—Equity will not require an accounting by a principal for money voluntarily paid by the agent, without knowledge of the principal, in managing real estate securities intrusted to him, on the theory that enough can be realized on the securities to pay the agent's claim after the principal's claim has been satisfied, on the mere testimony of the agent, based on the opinion of his subagents and his own casual inspection of the property, that "if the lands are properly handled" there will be a surplus.—CARPENTER V. MOMSEN, Wis., 65 N. W. Rep. 1027.

37. EQUITY — Dispute between Partners.—A court of equity may require an accounting and distribution of the assets of a firm between the partners in the proportion fixed by an award made under a submission by the partners.—WITZ V. TREGALLAS, Md., 33 Atl. Rep. 722.

38. EQUITY—Jury Trial.—Courts of chancery are not strictly courts according to the course of the common law, and the constitutional guaranty of trial by jury has no reference to such courts in their recognized sphere of equity jurisdiction, nor does such guaranty extend to all cases at law, as there are proceedings in many inferior courts and many summary proceedings in *nisi prius* courts in which a jury was never employed.—WIGGINS V. WILLIAMS, Fla., 18 South. Rep. 859.

39. EQUITY — Pleading — Bill.—A bill which alleges that the subject-matter of the controversy arose out of senior defendant's failure to pay complainant his share of the profits arising from the negotiation of certain mortgage loans on real estate, and that part of the lands from which complainant was entitled to derive profits had vested in junior defendant, whose relation to the property was that of a trustee, entirely subsidiary to senior defendant, states a cause of action, and is not multifarious.—CHEW V. GLENN, Md., 33 Atl. Rep. 722.

40. EQUITY — Reformation of Mortgage.—Equity will correct a mistake in a mortgage whereby property intended to be included therein was inadvertently

omitted, even after the mortgage has been foreclosed, and the property described in it has been levied upon and sold under the mortgage *fi. fa.*; and after such correction the lien of the mortgage on the omitted property will be superior in dignity to that of a judgment obtained after the mortgage was originally executed, and before its reformation.—PHILLIPS V. ROQUEMORE, Ga., 23 S. E. Rep. 855.

41. EVIDENCE—Judicial Notice—Municipal Improvements.—Courts take notice of the streets, and of the names and locations of the suburbs from time to time brought within the city limits.—POLAND V. DREYFOUS, La., 18 South. Rep. 906.

42. EVIDENCE—Parol Evidence — Action on Subscription.—In an action upon a written subscription, parol evidence is not admissible to add conditions to those expressed in the writing sued upon.—NEBRASKA EXPOSITION ASS'N V. TOWNLEY, Neb., 65 N. W. Rep. 1062.

43. EVIDENCE—Statutes of Sister State.—In garnishment proceedings it appeared that defendant had a life estate in land in Indiana on which tobacco, the proceeds of which was garnished, were raised. He leased the land for one-third of the tobacco as rent. Claimants, his children, were the remainder-men, and had mortgaged their interest to secure a debt of their father, and he agreed that they should have his share of the crop to apply on the debt. When the tenant stated that he was going to ship the tobacco to Kentucky, claimants, fearing that in that State it might be subjected to plaintiff's debt, paid the father the value of his interest in the crop. Plaintiff, defendant, and claimants lived in Indiana: Held, that on an issue whether the transaction between defendant and claimants was fraudulent, it was error to refuse to permit one learned in the statute law of Indiana to testify that under the laws of that State neither the tobacco nor its proceeds could be made liable to the payment of plaintiff's debt.—BARKER V. BROWN, Ky., 23 S. W. Rep. 883.

44. EXECUTION—Husband and Wife.—Where a wife loaned money to her husband to buy certain goods, and there was no understanding that they were to be hers, they are liable under the execution for a debt of the husband.—GOESCHEL V. FISHER, Mich., 65 N. W. Rep. 965.

45. FRAUDULENT CONVEYANCE — Change of Possession.—The continued possession and use of personal property by the vendor for his own use is inconsistent with a *bona fide* sale of the property, and requires satisfactory proof in explanation of such possession and use.—BRIGGS V. WESTON, Fla., 18 South. Rep. 852.

46. FRAUDULENT CONVEYANCE — Evidence.—A mortgage of its assets, real and personal, made by a land company to secure bonds provided that until default the company should retain the mortgaged property and the income therefrom, and have the same power to control and sell the same as if the mortgage had not been made, and that upon the sale of any part thereof a release for such part should be given by the trustee in the mortgage. It appeared that the mortgage covered all such solid assets as would furnish grounds of confidence to creditors: Held, that the mortgage was void as against existing creditors, but not as against subsequent creditors.—CENTRAL TRUST CO. OF NEW YORK V. EAST TENNESSEE LAND CO., U. S. C. C. (Tenn.), 71 Fed. Rep. 353.

47. FRAUDULENT CONVEYANCE — Insolvent Debtor—Gift.—A gift by a debtor insolvent at the time is void as to his then existing creditors, whether made for the purpose of defrauding them or not; but a gift by such a debtor is not void as to a person who subsequently becomes his creditor, unless at the time of making the gift there was an actual intention on the part of the debtor to afterwards obtain credit from and defraud that person, and the gift was made in whole or in part for the purpose of accomplishing this result. Even if the money of the subsequent creditor was obtained by the debtor for the express purpose of paying debts existing when the gift was made, and was actually used for that purpose, these facts alone would not make the gift void as to this creditor, if the conduct of the debtor throughout the entire transaction was honest, and he had no real intent to defraud.—FIRST NAT. BANK OF CARTERSVILLE V. BAYLISS, Ga., 23 S. E. Rep. 815.

48. GARNISHMENT—Admissions—Estoppel.—The obligors upon a bond given to procure the discharge of a garnishee as provided in Gen. St. 1894, § 5342, in which was admitted that the plaintiff had garnished the money, property, and effects of the defendant in the hands of the garnishee, are estopped in an action upon the bond, and cannot be permitted to assert that the admission was false.—GREENGARD V. FRETZ, Minn., 65 N. W. Rep. 949.

49. GARNISHMENT—Receivers.—Funds in the hands of a receiver are not subject to garnishment; a proceeding by garnishment not being a suit, within Sayles' Civ. St. art. 1468, stating conditions under which a receiver may be sued.—KREISLE V. CAMPBELL, Tex., 23 S. W. Rep. 852.

50. INJUNCTION—Appeal.—Upon an appeal from an order denying a preliminary injunction, as well as upon appeal from an order granting such injunction, the decision of the judge who made the order will not be reversed, unless it appears, after a consideration of the grounds presented to him for his action, that his legal discretion to grant or withhold the order was improvidently exercised.—THOMPSON V. NELSON, U. S. C. C. of App., 71 Fed. Rep. 339.

51. INJUNCTION—Dissolution—Damages.—In a suit for damages on an injunction bond, plaintiff sought to recover, as one item of damages, fees paid to an attorney who resisted the injunction, and also tried the cause on its merits: Held that, since the attorney was employed generally, fees could not be recovered as damages.—CREEK V. MCMANUS, Mont., 43 Pac. Rep. 497.

52. INJUNCTION—Pleading.—On motion to dissolve a temporary injunction restraining, as unreasonable, the enforcement of a city ordinance requiring a railroad company to light its tracks at certain street crossings, the bill, though containing merely conclusions, in alleging the unreasonableness of the ordinance, and for that reason confessedly insufficient on demurrer, in the absence of objection, will be held sufficient.—LOUISVILLE & N. R. CO. V. CITY OF BESSEMER, Ala., 18 South. Rep. 880.

53. INJUNCTION—Trespass to Land.—Equity will enjoin repeated and continued trespasses to land where the trespasser is insolvent.—MARTIN V. DAVIS, Iowa, 65 N. W. Rep. 1001.

54. INSURANCE—Action—Time of Bringing.—McClain's Code, § 1734, providing that no actions shall be begun on an insurance policy within 90 days after notice of loss has been given, prevents the insured from suing within that time, though the insurer, on receipt of proof of loss, absolutely denied liability.—FINSTER V. MERCHANTS' & BANKERS' INS. CO., Iowa, 65 N. W. Rep. 1004.

55. INSURANCE — Conditions — Waiver. — Where the agent of an insurance company is notified, at the time the application for insurance is made, that insured only owns an estate for years in the land on which the buildings to be insured are situated insurer will be held to have waived a condition in the policy, when issued, avoiding it in case insured's interest in the land is not a fee-simple, though the policy also contain a condition that no agents can waive provisions of the policy, except in writing indorsed thereon.—GOSS V. AGRICULTURAL INS. CO. OF WATERTOWN, Wis., 65 N. W. Rep. 1036.

56. INSURANCE—Damage by Explosion.—Under an insurance policy containing a provision that the insurer should not be liable for loss or damage "by explosion, from any cause, unless fire ensues, and then only for the loss or damage by fire," damage resulting from the exploding of dynamite or some other substance by some person at the door of the insured building, no

fire ensuing, cannot be recovered, though the explosive was ignited by fire.—PHOENIX INS. CO. v. GREER, Ark., 33 S. W. Rep. 840.

57. INSURANCE—Increase of Risk.—Where a fire policy provides for the ascertainment of the increase of risk due to the location of any engine on the premises, and requires the insured to pay additional premium for any increase of risk found, the location of an engine on the premises the day before a loss will not prevent recovery, where the insured, 10 days prior to its occurrence, notified the company that he frequently used an engine on his premises, and offered to pay the additional premium, but the company failed to act on the notice.—FARMERS' MUT. FIRE INS. CO. OF DUG HILL v. SCHAEFFER, Md., 33 Atl. Rep. 728.

58. INTOXICATING LIQUORS — Statutes—Repeal.—Act April 3, 1889, providing "that it shall be unlawful for any person to sell wine at any place in this State, except as authorized in this act," and authorizing its sale, in quantities not less than one quart, on the premises where the fruit from which it is made is grown, and in any place where the sale of intoxicating liquors is licensed and authorized, impliedly repeals Sand. & H. Dig. §§ 4851, 4868, in so far as they authorize the sale of wine in original packages containing not less than five gallons; and therefore, since the provisions authorizing the sale of wine on the premises on which the fruit is grown is unconstitutional, the manufacturer of wine from fruit grown by him can only sell the wine in places where the sale of intoxicating liquors is licensed.—HUBMAN v. STATE, Ark., 33 S. W. Rep. 843.

59. JUDGMENT—Vacation.—A judgment and sale of land in an action aided by attachment will not be set aside, after the lapse of three years, because no notice of the action was served on defendant, where it appears that defendant had actual knowledge of the action; having appeared in a suit in equity commenced at the same time to set aside a conveyance of the land by him as fraudulent, in which defendant acknowledged the commencement of the action at law, and failed to object to the judgment for want of notice, when set up in the equity action, after recovery, by amended complaint. — CORN EXCH. BANK v. APPELGATE, Iowa, 65 N. W. Rep. 1007.

60. LANDLORD AND TENANT—Condition Subsequent.—The breach of a condition subsequent in a deed does not, of itself alone, defeat the grantee's estate, nor revest title in the grantor, until after entry, or recovery in an action brought by him or his heirs; and the same rule is applicable in case of the lease of realty for a term of years.—PEACOCK & HUNT NAVAL STORES CO. v. BROOKS LUMBER CO., Ga., 23 S. E. Rep. 836.

61. LANDLORD AND TENANT—Rent—Counterclaim.—When lessees enter into and retain possession of the rented premises under a covenant in the lease that the landlord will make improvements, which he fails to do the lessees, when sued for the rent, may recoup the damages resulting from such breach of the covenant, or set up the resulting damages as a counterclaim. Such counterclaim arises out of the contract sued upon as the foundation of the landlord's claim, and is connected with the subject of the action.—PIONEER PRESS CO. v. HUTCHINSON, Minn., 65 N. W. Rep. 938.

62. LIEN—Laborer's Lien—Excavation of Land.—Gen. St. 1894, § 6230, provides that whoever performs labor, etc., "for grading, filling in, or excavating any land," etc., shall have a lien upon the land for the price of his labor: Held, that a hole drilled in the ground solely for the purpose of ascertaining whether there is ore underneath, and, if so, whether it exists in paying quantities, it is not an excavation of the land for which the statute gives a lien; that the statute only refers to excavations made for the purpose and in the progress of making improvements upon the land.—COLVIN v. WEIMER, Minn., 65 N. W. Rep. 1079.

63. MALICIOUS PROSECUTION—Civil Suit.—An action for damages will lie for maliciously and without probable cause prosecuting a civil suit against one resulting in actual damage, though it was commenced with an ordinary summons, and without seizure of the person or property.—LIPSCOMB v. SHOFNER, Tenn., 33 S. W. Rep. 818.

64. MANDAMUS—Constitutional Law.—The constitutionality of an act of the legislature cannot be determined collaterally by the court in an application for a writ of mandate by a private party to enforce a private right. — WRIGHT v. KELLY, Idaho, 43 Pac. Rep. 565.

65. MARRIED WOMAN—Surety on Note.—Evidence in an action against a married woman upon a note executed by her, as surety, examined, and held sufficient to sustain a verdict against her.—SPATZ v. MARTIN, Neb., 65 N. W. Rep. 1063.

66. MASTER AND SERVANT—Defective Appliances.—An employee cannot recover for injuries from defective appliances while using them, without necessity, in a manner and for a purpose not intended, where the defects would not render such appliances unfit to be used as intended.—JAYNE v. SEBEWAING COAL CO., Mich., 65 N. W. Rep. 971.

67. MASTER AND SERVANT — Unsafe Machinery.—A railway company is liable for injuries resulting to its employees from its failure to use ordinary care to furnish safe machinery and appliances for their use in operating the road. Ordinary care in this connection means such care as an ordinarily prudent man would use under the circumstances, and it is to be measured by the character and risks of the business. The company is not, however, bound to insure the absolute safety of its machinery, or to provide the best, safest or newest machinery.—TEXAS & P. RY. CO. v. ELLIOTT, U. S. C. C. of App., 71 Fed. Rep. 378.

68. MECHANICS' LIENS—Construction of Contract.—A building contract provided that the owner should retain 10 per cent. from payments on partial estimates until completion of the building, and also that a certain part of the contract price should be paid in an order on another: Held, that as affecting claims of subcontractors to mechanics' liens, the 10 per cent. should be retained from the amount of the order, as well as the cash payments.—MERRITT v. HOPKINS, Iowa, 65 N. W. Rep. 1015.

69. MECHANIC'S LIEN—Hauling Material for Building.—One who, under a contract with the owner or contractor, hauls material for a building, erection or other improvements, and which is used in the erection of the same, is entitled to a lien therefor under the mechanic's lien laws of this State.—KEHOE v. HANSEN, S. Dak., 65 N. W. Rep. 1075.

70. MECHANIC'S LIEN—Notice.—The fact that a wife, who has a community interest with her husband in real estate, is not named as owner in a notice of claim for lien thereon, will not defeat the lien, where it does not appear that the claimant knew of her interest, and she is made a party to the action to foreclose.—BOLSTER v. STOCKS, Wash., 43 Pac. Rep. 540.

71. MECHANIC'S LIEN—Notice—Sufficiency.—A notice of mechanic's lien, which recites the contract as being to furnish "the hardware and other like material" for a building, will be construed to mean all the hardware for the building, and is sufficiently definite.—BOLSTER v. STOCKS, Wash., 43 Pac. Rep. 432.

72. MECHANIC'S LIEN — Prior Mortgage. — Where buildings on mortgaged premises are burned, and the mortgagee allows insurance money to be used in erecting new buildings thereon, one furnishing material for the new buildings is entitled to a lien thereon prior to the mortgage, under Sayles' Civ. St. art. 3171, providing that mechanics' liens shall attach to buildings in preference to any prior incumbrance on the land on which the buildings are erected.—PEOPLE'S BUILDING, LOAN & SAVINGS ASSN. v. CLARK, Tex., 33 S. W. Rep. 881.

73. MORTGAGES — Foreclosure by Advertisement.—Gen. St. 1894, § 6051, provides that the party foreclosing

a mortgage shall make and file an affidavit of costs and disbursements "within ten days after foreclosure:" Held, that the ten days begin to run, not from the day the property is offered for sale and struck off to the purchaser, but from the time the foreclosure sale is completed by the execution and recording of the certificate of sale.—LAROCQUE v. CHAPEL, Minn., 65 N. W. Rep. 941.

74. MORTGAGE — Redemption from Foreclosure — Tender.—A tender of the amount required to redeem from a mortgage foreclosure sale must be kept good in order to be effectual as the basis of a subsequent action to compel a redemption, brought after the time for redemption has expired.—DUNN v. HUNT, Minn., 65 N. W. Rep. 948.

75. MORTGAGES—Transfer of Mortgaged Property.—Granting that the maker of a note and mortgage, who transfers the property to another, assuming payment of the mortgage debt, becomes thereby a surety only for its payment, the extension of one of two notes secured by the mortgage does not extend the other, even if both have matured by the terms of the mortgage because of default in payment of one, nor prevent the immediate enforcement of the one not extended, and will not release the maker from liability thereon, though the extension was made without his consent.—OWINGS v. MACKENZIE, Mo., 33 S. W. Rep. 802.

76. MORTGAGE FORECLOSURE — Redemption—Constitutional Law.—Act February 23, 1895, which amends Hill's Ann. Code, § 303, by increasing the time for redemption from forced sales of real estate from four months to one year from confirmation of the sale, applies to subsequent decretal sales for mortgages made prior to its passage.—STATE v. SEARS, Oreg., 43 Pac. Rep. 482.

77. MORTGAGE FORECLOSURE—Sale Under Decree.—The highest bidder at a sale under a decree in an action to foreclose a mortgage has, before confirmation of sale, no right to resist a resale, the commissioner conducting the sale having authority only to receive and report the highest bid for consideration and action of the court.—CENTRAL TRUST CO. v. GATE CITY ELECTRIC ST. RY. CO., Iowa, 65 N. W. Rep. 982.

78. MUNICIPAL CORPORATIONS—Change of Grade of Streets—Liability.—The occupation of a public street for its entire width by a permanent viaduct approach on a higher grade than the street is equivalent to a change of grade, and as such does not entitle abutting owners to damages as for an original taking of private property for public use, though the act authorizing its construction, for its protection and police purposes, provides that it shall remain under the absolute control of the city, and prohibits the granting of any exclusive franchise for its use for any purpose.—COLCLOUGH v. CITY OF MILWAUKEE, Wis., 65 N. W. Rep. 1040.

79. MUNICIPAL CORPORATION — Contract — Construction.—Where a city, in consideration of the erection of waterworks, agrees to rent for a certain term a certain number of hydrants, which are to be furnished and placed at the expense of the city, it is not liable for rental of the hydrants on failure to furnish them and direct where they shall be placed, in the absence of any showing that it was called upon to do so by the other party.—ELLENSBURG WATER SUPPLY CO. v. CITY OF ELLENSBURG, Wash., 43 Pac. Rep. 531.

80. MUNICIPAL CORPORATIONS — Defective Streets — Imputed Negligence.—Negligence of plaintiff's companion, who was merely walking upon the sidewalk with him, in stepping upon a loose board, whereby plaintiff was thrown and injured, cannot be imputed to plaintiff, so as to prevent a recovery from the city on account of its negligence in keeping the walk in repair.—BARNES v. TOWN OF MARCUS, Iowa, 65 N. W. Rep. 984.

81. MUNICIPAL CORPORATION—School Districts—Annexation.—Where a city annexes a part of a school township, and therewith a school house and lot, the school corporation of such city is entitled to a deed from the school township from which the territory was taken conveying such school property free from any liability for the value of it, or for a part of an unpaid indebtedness of such school township incurred in either the purchase of the lot or the erection of the house.—BOARD OF SCHOOL COMMRS. OF CITY OF INDIANAPOLIS v. CENTER TP. OF MARION COUNTY, Ind., 42 N. E. Rep. 808.

82. MUNICIPAL CORPORATIONS—Torts of Servants.—Where a city contract with one for the disposal of garbage regulates the place of deposit by providing that it shall be thrown into Lake Michigan, at a point not less than fifteen miles from the city, and reserves no right to control the mode or manner of its performance, the city is not liable for injuries to nets set in the lake caused by the garbage floating into them.—KUEHN v. CITY OF MILWAUKEE, Wis., 65 N. W. Rep. 1030.

83. NEGLIGENCE—Personal Injuries—Damages.—In an action for personal injuries, that the effect of the injuries was increased through the unskillfulness of the surgeon employed by plaintiff to attend her will not diminish the amount of her recovery, where she used reasonable diligence and care in the selection of the surgeon.—REED v. CITY OF DETROIT, Mich., 65 N. W. Rep. 967.

84. NEGOTIABLE INSTRUMENTS — Procurement by Fraud—Ratification.—The mere promise to pay, or the procuring an extension of the time for paying, a promissory note obtained from a party without his fault, by fraud and artifice, and which he is under no legal or moral obligations to pay, does not, as a matter of law, constitute a ratification of the note, in the absence of any facts creating an estoppel *in pais*.—FIRST NAT. BANK OF DECORAH v. HOLAN, Minn., 65 N. W. Rep. 932.

85. NEGOTIABLE INSTRUMENT—Usury—Interest after Maturity.—Where, by the terms of a promissory note, it is provided that it shall bear interest until maturity at a given rate, and thereafter at a higher lawful rate, such contract is not usurious, nor is the agreement for the higher rate of interest after maturity a mere penalty.—OMAHA LOAN & TRUST CO. v. HANSON, Neb., 65 N. W. Rep. 1058.

86. NUISANCE—Prescription—Estoppel.—Action to enjoin the maintenance of a nuisance caused by the escape of nauseous and offensive gases from a gas plant, and smoke, cinders and soot from an electric light plant, owned and operated by defendants, into and upon the adjacent premises of the plaintiff. That part of the plant constituting the gas works had been operated by defendant for fifteen years, but had been enlarged, and the mode of making gas changed, within that time. That part of the plant constituting the electric light works had only been built and operated about eight years. The plaintiff did not object to the construction of the works while they were being built, but ever since they have been operated has continuously objected to and remonstrated against the acts creating the nuisance: Held, that plaintiff is not estopped by his conduct from objecting to the continuance of the nuisance.—MATTHEWS v. STILLWATER GAS & ELECTRIC LIGHT CO., Minn., 65 N. W. Rep. 948.

87. OFFICERS—State Officers—Title to Office.—A mayor of a city of the third class, who acts wholly under the powers conferred by the municipal charter, is not an officer "under this State," within Const. art. 6, § 12, and Amend. 1884, § 5, which together give the supreme court appellate jurisdiction in cases involving "the title to any office under this State."—STATE v. WALKER, Mo., 33 S. W. Rep. 813.

88. PARTNERSHIP — Contract—Evidence.—In the case of an express promise by one partner to repay to the other his share of advances made by the latter on account of partnership business, the amount of such share becomes the debt of the promisor, recoverable by an action at law, without dissolution of partnership or an accounting between the partners.—HASKINS v. CURRAN, Idaho, 43 Pac. Rep. 559.

89. PARTNERSHIP — Contract—Abandonment.—Where persons, in contemplation of partnership, and holding themselves out as partners, contract as such, a subsequent abandonment of the formation of the partnership will not affect their liability as partners on the contract.—CAIN LUMBER CO. v. STANDARD DRY-KILN CO., Ala., 18 South. Rep. 882.

90. PLEADING — Amendment of Declaration.—An amended declaration which seeks to recover on the same contract as the original, and for the same property, though the breach is differently alleged, does not state a new cause of action.—STRANG v. BRANCH CIRCUIT JUDGE, Mich., 65 N. W. Rep. 969.

91. PLEADING—Sham Answer—Motion to Strike.—Under Rev. St. § 2682, providing that a sham answer, whether by way of denial or avoidance, may be stricken out, but no defense shall be deemed sham, the truth of which shall be supported by the affidavit of a single witness, either by way of verification, or in opposing a motion to strike out, a verified answer is not open to a motion to strike out as sham.—PFISTER v. WELLS, Wis., 65 N. W. Rep. 1041.

92. PRINCIPAL AND AGENT — Commissions.—Plaintiff contracted with defendant, a corporation of another State, to act as its agent in selling school furniture on commission, and bound himself to sell to such persons only as were legally qualified to enter into contracts, which contracts were to be subject to defendant's acceptance. Plaintiff sold on contracts that were not binding on the districts they purported to obligate, and such contracts were accepted by defendant; both plaintiff and defendant acting in good faith, believing them to be legal: Held, that defendant was not estopped by its acceptance of the contracts to plead their illegality in defense to a claim for commissions, nor to recover back commissions already paid under the mistake of both parties.—CLEVELAND SCHOOL-FURNITURE CO. v. HOTCHKISS, Tex., 33 S. W. Rep. 855.

93. PRINCIPAL AND SURETY — Official Bond.—A judgment against a constable is not even *prima facie* evidence against the sureties on his bond, conditioned for faithful performance of the duties of his office.—RODINI v. LYTLE, Mont., 43 Pac. Rep. 501.

94. PROCESS—Service of Summons—Privilege of Litigant.—Under Sand. & H. Dig. § 5696, permitting certain actions to be "brought in any county in which the defendant, or one of several defendants, resides or is summoned," jurisdiction cannot be obtained of a defendant, in a county other than that of his residence, by service of summons on him while in such county in attendance on the taking of depositions in a pending action to which he is a party.—POWERS v. ARKADELPHIA LUMBER CO., Ark., 33 S. W. Rep. 842.

95. PROHIBITION—Constitutional Law.—The constitutionality of an act of the legislature will not be passed upon in an application for writ of prohibition, in a case where it is not directly in issue, and is only collateral to the questions in issue as shown by the petition.—BELLEVUE WATER CO. v. STOCKSLAGER, Idaho, 43 Pac. Rep. 568.

96. PUBLIC BUILDINGS — Mechanic's Lien.—In an action to enforce a claim for furnishing materials for a public building, a refusal to allow an amendment of the notice of claim after the time for filing the notice has expired, so as to make it comply with the statute, is proper.—MCGILLIVRAY v. DISTRICT TP. OF BARTON, Iowa, 65 N. W. Rep. 978.

97. QUO WARRANTO—Trial of Title to Office.—*Quo warranto* is the only direct and adequate remedy for the trial and determination of a title to a public office, and the judgment in such an action is the only one which affords complete and substantial relief. The review, by *certiorari*, of the proceedings of an election or appointment to a public office, can determine nothing which would be of any efficacy as a bar, or have any other effect in a subsequent information in the nature of *quo warranto*, nor could the question arising upon such review, although judicially determined, be regarded as *res adjudicata* in the subsequent information.—STATE v. MAYOR, ETC., OF CITY OF BAYONNE, N. J., 33 Atl. Rep. 734.

98. RAILROAD COMPANY — Electric Railway — Negligence.—An instruction in an action for injury to a person who, while driving between the tracks of an electric street car line and the curbing, was struck by a car coming from the rear, that if, when plaintiff was seen by the employee in charge of the car he was partly on the car track, and thereupon the bell was rung, and thereafter plaintiff left the track, and went to the side thereof, and the speed of the car was then increased, complaint could not be made of such increase in the speed, as the employee would have the right to suppose plaintiff left the track because of the warning, is properly refused, because ignoring the fact that the employee may have known or had reason to believe plaintiff was not aware of the approach of the car.—WILKINS v. OMAHA & C. B. RAILWAY & BRIDGE CO. Iowa, 65 N. W. Rep. 997.

99. RAILROAD COMPANIES—Receivers — Redelivery.—The return of its property to a railroad company by receivers, on their discharge, and the acceptance thereof by it, do not *ipso facto* render the company liable on claims accruing during the receivership through acts of the receivers.—MISSOURI, K. & T. RY. CO. v. MCFADDEN, Tex., 33 S. W. Rep. 853.

100. RAILROAD COMPANY—Rules—Waiver.—A rule of a railway company, directing brakemen to not uncouple cars while in motion, may be waived by the company by disregard thereof on the part of brakemen for such a time that the officers were chargeable with notice, though the brakemen have knowledge of the rule, and also the dangers incident to the employment.—FISH v. ILLINOIS CENT. R. CO., Iowa, 65 N. W. Rep. 996.

101. RECEIVER—Appointment—Intervention.—Where a corporation, having procured a policy of insurance, makes an assignment, and thereafter a receiver is appointed, the insurance company, on loss by fire, after action on its policy by the receiver, cannot intervene in the original action, and ask that the appointment of the receiver be set aside.—BARTH v. AMERICAN INS. CO. OF BOSTON, Wis., 65 N. W. Rep. 1035.

102. RES JUDICATA.—Where one to whom a decree awards the right to appropriate a certain quantity of water in excess of what he is entitled to from a natural stream for irrigation, after decree, continuously asserts that right by user, the decree is, as to the parties to it, *res judicata* in a subsequent action between them for the same quantity.—BOULDER & WELD COUNTY DITCH CO. v. LOWER BOULDER DITCH CO., Colo., 43 Pac. Rep. 540.

103. SALE OF BUSINESS—Covenants.—Action may be maintained on the covenant of an insurance agent, in his contract of sale of his business, not to re-engage in the business, though the buyer does not execute to the seller notes for deferred payments, as provided in the contract of sale; the seller having given orders to insurance companies, on the buyer, for the purchase price, which were accepted by the buyer, and the insurance companies having thereafter accepted, in lieu of the buyer's personal liability on his acceptances, the undertaking of his transferee of the business that such payments should be a charge on the business.—KLEIN v. BUCK, Miss., 18 South. Rep. 891.

104. SCHOOLS—Teachers — Revocation of License.—Where the statute authorizes the revocation of the license for immorality, incompetency, and "other adequate causes," and the revocation of the license is after notice to the person, the examiner is not liable for damages if he acted in good faith and without malice, though his decision that the person's conduct authorized the revocation is erroneous.—LEE v. HUFT, Ark., 33 S. W. Rep. 846.

105. SPECIFIC PERFORMANCE.—Specific performance of a contract of sale, signed, in the name of the owner of the land by another, will not be enforced, when no authority for such other to sign the contract was

shown and payments made under the contract were never received by such owner, and the contract price was inadequate to the knowledge of all parties to the contract.—CONDON v. OSGOOD, Iowa, 65 N. W. Rep. 1003.

106. TELEGRAPH COMPANIES—Damages—Excessive.—Upon the assumption that all of the evidence introduced by the plaintiff was legally admitted, he was entitled to a recovery; but according to the principles announced by this court in Margarahan v. Wright, 10 S. E. Rep. 584, 83 Ga. 773, and Baldwin v. Telegraph Co., 21 S. E. Rep. 212, 93 Ga. 692, the verdict rendered was too large, for, even if the offer of employment made to the plaintiff contemplated a longer term of service than one month, how much longer such term was to be, or would have been, had the contract of employment been completed, is, under the evidence, too indefinite and uncertain to render the plaintiff's loss of time for a greater period than one month a basis for damages.—MONDON v. WESTERN UNION TEL. CO., Ga., 23 S. E. Rep. 853.

107. TRIAL—Motion for Verdict.—In an action to recover on the ground of negligence, unless facts are undisputed from which contributory negligence of plaintiff, or want of negligence of defendant, is obvious, the question should be submitted to the jury.—STROBLE v. CITY OF NEW ALBANY, Ind., 42 N. E. Rep. 806.

108. TROVER AND CONVERSION—Repledge of Collateral Paper.—In an action on a note it appeared that, at the time defendant made it, she pledged to plaintiff's intestate other notes as collateral security; that decedent had repledged them as collateral to a loan made to himself, and that plaintiff was unable to produce them; that defendant admitted her liability on her note, and, in a counterclaim, prayed judgment against decedent's estate for the difference between the value of the collateral notes and the amount due from her: Held, that the repledging of the notes was a conversion, and that defendant was entitled to judgment as prayed.—RICHARDSON v. ASHBY, Mo., 33 S. W. Rep. 806.

109. TRUSTS—Equity Jurisdiction.—For the purpose of preserving a trust, a court has power to order a sale, mortgage, or lease of the trust property, although the trust instrument contains no power or authority for so doing, and to bind by its judgment parties, not in being, who may thereafter become beneficiaries of the trust.—MAYALL v. MAYALL, Minn., 65 N. W. Rep. 942.

110. TRUSTS—Purchase by Trustee.—Where one managing property for the benefit of a widow and her children buys in an outstanding title, he cannot charge the cost thereof to the latter, on the ground that the purchase was for their benefit, unless they consented to the purchase.—SHAW v. DEVECMON, Md., 33 Atl. Rep. 716.

111. USURY — Contract to Release Debt in Case of Death.—One K, having applied to defendant for a loan of $2,000, entered into a contract with it which provided that K should give 10 promissory notes for $360 each, payable in installments of $30 per month, to be secured by mortgage on real estate, and that in case of K's death before the full payment of the notes the remainder of the debt should be released by defendant, K agreeing to pass a medical examination before the execution of the contract. The notes and mortgage were given according to the contract, K receiving in cash $1,970, and installments amounting to $1,230 were paid. It appeared that defendant had an arrangement with a life insurance company for indemnity against loss by K's death, for which it paid much less than the amount which K had agreed to pay in excess of the loan and legal interest: Held, that the contract was contrary to public policy and tainted with usury, and that K was entitled to a cancellation of the notes and mortgage.—KRUMSIEG v. MISSOURI, K. & T. TRUST CO., U. S. C. C. (Minn.), 71 Fed. Rep. 350.

112. USURY—Equitable Relief.—Code, § 2818, provides that all contracts for the loan of money at a greater rate than 6 per cent. shall be deemed to be for an illegal consideration as to the excess beyond the principal sum loaned: Held that, where usurious interest has been voluntarily paid, as interest, on a debt secured by deed of trust, equity, in a suit to enjoin a sale under the deed, will not, after the year within which usurious interest may be recovered at law, apply any of the payments of usurious interest in reduction of the principal. — MUNFORD v. MCVEIGH'S ADM'R, Va., 23 S. E. Rep. 857.

113. WILL—Attestation—Codicil.—Rev. St. § 2282, provides that a will must be in writing, signed by the testatrix, and attested and subscribed in the presence of testatrix by two competent witnesses: Held, that an instrument bearing the genuine signature of the testatrix, subscribed before the signing by two competent witnesses, and not in their presence, is valid, where it was subscribed by the witnesses in the presence of the testatrix.—SKINNER v. AMERICAN BIBLE SOC., Wis., 65 N. W. Rep. 1037.

114. WILL—Construction.—The punctuation of an instrument may be considered, in order to solve an ambiguity which was not created by the punctuation.—OLIVET v. WHITWORTH, Md., 33 Atl. Rep. 724.

115. WILLS—Mental Capacity—Undue Influence.—The testator's declarations subsequent to the execution of the will are not admissible to prove undue influence, but, if such influence be otherwise established, such declarations may be considered to determine the testator's mental condition at the time of making the will and the effect of such undue influence.—KIRKPATRICK v. JENKINS EX'RS., Tenn., 33 S. W. Rep. 819.

116. WILL—Owner of Life Estate.—A will gave plaintiff "all the estate" of the testator "for her sole use and benefit during her natural;" afterwards to be divided: Held, that it gave plaintiff a life estate in the testator's real estate.—SMITH v. RUNNELS, Iowa, 65 N. W. Rep. 1002.

117. WILLS—Reformation.—Reformation and correction of a will to make it conform to the purpose and intention of testator, not expressed in the instrument as executed by him, cannot be decreed.—SCHLOTTMAN v. HOFFMAN, Miss., 18 South. Rep. 983.

118. WILL—Testamentary Capacity.—On the issue of testator's capacity to make a valid will, it is error to charge that: "In order to possess testamentary capacity it is not necessary that one should know the number and conditions of his relations or their claim upon his bounty, or that he should know or understand the reason for giving or withholding his bounty to or from any relative."—MORIARITY v. MORIARTY, Mich., 65 N. W. Rep. 964.

119. WITNESS — Child—Criminal Trial.—Rev. St. 1889, § 8925, makes a child under 10 years of age who appears incapable of receiving just impressions of the facts, or of relating them truly, incompetent to testify: Held, that it is within the discretion of the court to allow a child under 10 years of age to testify who has shown to the court that he is capable of receiving just impressions and relating them truly.—STATE v. NELSON, Mo., 33 S. W. Rep. 809.

120. WITNESS — Competency.—Where a stockholder of a corporation did not act as its agent in negotiating a contract it has sued on, he is not an incompetent witness as a party to the contract, within Rev. St. 1889, § 8918 (formerly Rev. St. 1879, § 4010), providing that a party in interest shall be incompetent where one of the original parties to the contract in issue is dead.—BANKING HOUSE OF WILCOXSON & CO. v. ROOD, Mo., 33 S. W. Rep. 816.

121. WITNESS—Husband and Wife.—In an action by a woman on a promissory note, her husband is not a competent witness for defendants, within Code, § 3641, making husband and wife, incompetent witnesses one against the other, "except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other."—WARD v. DICKSON, Iowa, 65 N. W. Rep. 997.